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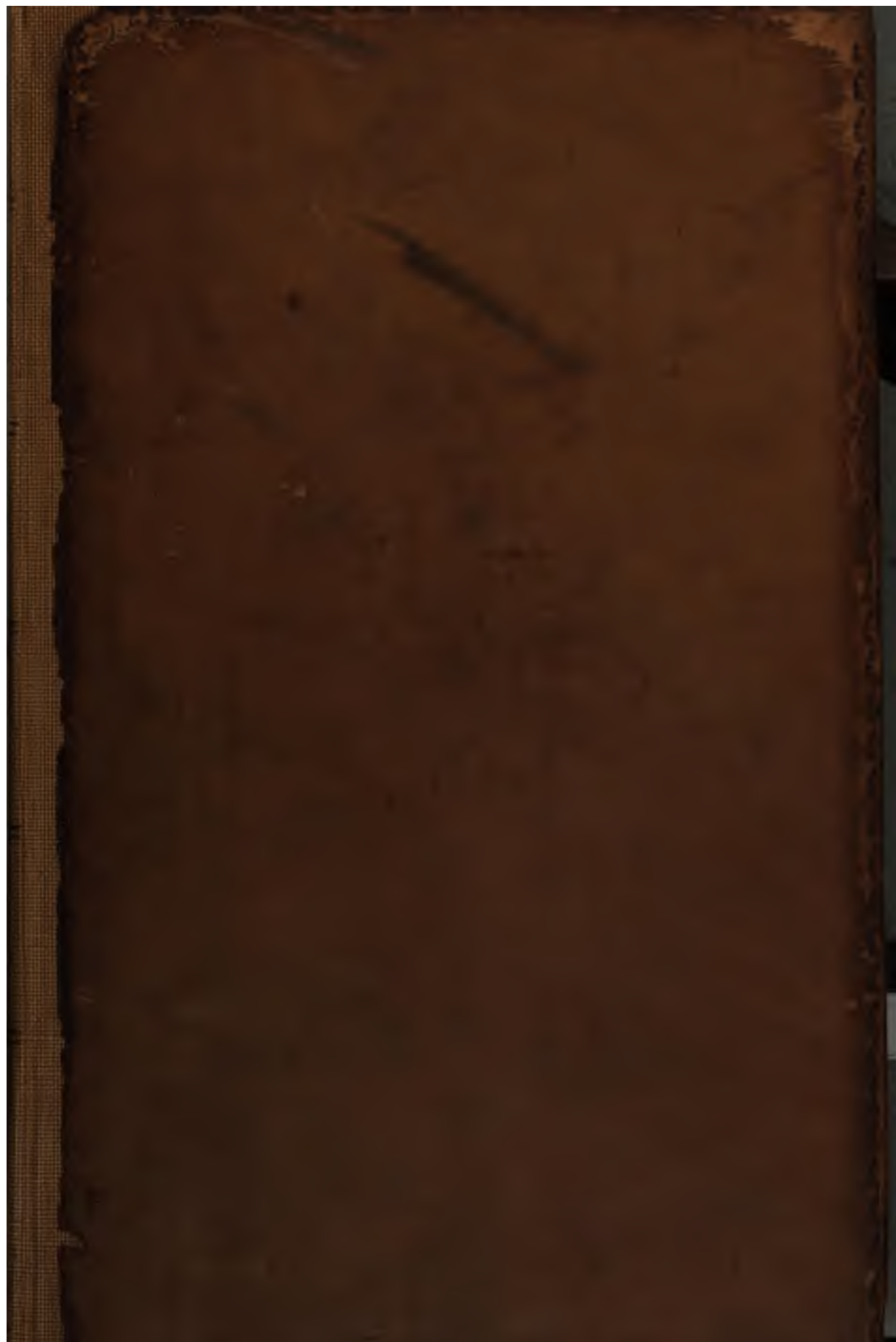
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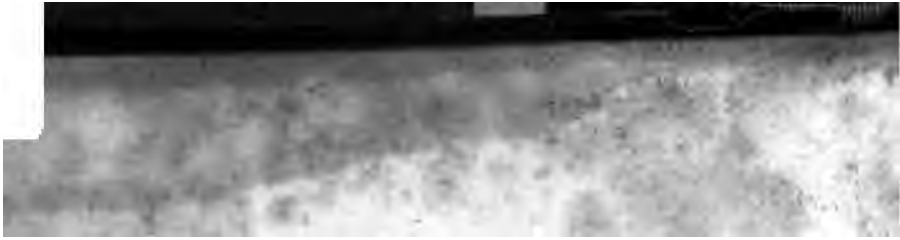
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R E P O R T S

OF

CASES,

J. R. Maitland
Esq.

DETERMINED

AT NISI PRIUS,

IN THE COURTS OF

KING'S BENCH AND COMMON PLEAS,

AND ON THE

OXFORD AND WESTERN CIRCUITS,

FROM THE

SITTINGS AFTER MICHAELMAS TERM, 4 GEO. IV. 1823.

TO THE

SITTINGS AFTER TRINITY TERM, 7 GEO. IV. 1826.

INCLUSIVE.

By EDWARD RYAN, Esq. AND WILLIAM MOODY, Esq.

OF LINCOLN'S INN, BARRISTERS AT LAW.

LONDON:

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1827.



A

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CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

MICHAELMAS TERM,

4 GEO. IV. 1823.

ADJOURNED SITTINGS AFTER TERM IN LONDON.

SAVORY v. PRICE.

GUILDHALL,
Dec. 17, 1823.

ACTION on the case for the infringement of a patent.

The patent, dated 23d *August*, 1815, had been granted for a method of making a neutral salt or powder, possessing all the properties of the medicinal spring at *Seidlitz*, under the name of "*Seidlitz Powder*."

The specification enrolled within the time required by the patent, set out three distinct re-

thods of producing them, held bad; those methods not being essential to the combination, nor part of the invention.

Patent for a mode of making a medicine by a particular combination of three known substances. The specification not describing those substances by their known names, but pointing out particular me-

to the combin-

1823.
 SAVORY
 v.
 PRICE.

cipes, (a) and described the modes and proportions in which the results were to be mixed, in order to produce the "*Seidlitz Powder*."

It was proved that the three products so mixed

(a) Recipe, No. 1.—Take of subcarbonate of soda twenty pounds, supertartrate of potash twenty-four pounds (avoirdupois weight); dissolve the subcarbonate of soda in twenty-five gallons of boiling water, and add the supertartrate of potash; filter the solution through paper, and evaporate it in a gentle heat until a pellicle appears on the surface, then set it by to crystallize; redissolve the crystals thus formed in six times their weight of boiling water; the solution must again be filtered, evaporated, and crystallized, and afterwards reduced to a fine powder.

Recipe, No. 2.—Take of subcarbonate of soda one hundred pounds, carbonate of ammonia twenty-five pounds; expose the carbonate of soda to a heat sufficiently strong to liquify it; then add the carbonate of ammonia in powder, and with a heat of 212° dry the salt, and pass it through a fine sieve.

Recipe, No. 3.—Take of supertartrate of potash one hundred pounds, mix it with thirty pounds of finely powdered chalk, and add it by degrees to one hundred and sixty of boiling water; stir it for some time, and when the tartrate of lime has subsided, pour off the supernatant liquor, and wash the residuum repeatedly with cold water. To the tartrate of lime thus formed add thirty pounds of sulphuric acid, previously diluted with eight times its weight of water; stir the mixture frequently during twenty-four hours; and after having separated the acid from the sulphate of lime by means of strong pressure, evaporate it in Wedgewood's dishes over a sand heat till a pellicle appears on the surface, then set it by to crystallize; these crystals are to be dissolved in boiling water filtered through white filtering paper, and again crystallized. Each dose of the *Seidlitz Powders* consists of two scruples of recipe No. 3. finely powdered and dissolved in half a pint of spring water, to which are added two drachms of recipe No. 1. and two scruples of recipe No. 2. (previously mixed); they must be stirred together, and taken during the state of effervescence.

answered the purpose professed in the patent, and that the combination was new and useful.

But, upon cross-examination of the plaintiff's witnesses, the following facts were established. The recipe No. 1. produced the substance called "Rochelle Salts." Rochelle salts were known to the world before 1815 under that name, and also as "Soda tartarizata."

Recipe No. 2. produced "Carbonate of Soda," which was known before 1815, and was in the Pharmacopœia of 1809; and a more expensive, but more perfect, way of making it was also known, and it might be bought in shops.

The recipe No. 3. produced "Tartaric Acid," the method of making which was known at the time of the patent, and under that or some other name it might be bought in chemists' shops, and other methods of making it were known, all of which would be equally efficacious for the combination of *Seidlitz* powders.

Rochelle salts, carbonate of soda, and tartaric acid mixed in the manner prescribed, produced the *Seidlitz* powder.

ABBOTT Ld. C. J. It is the duty of any one, to whom a patent is granted, to point out in his specification the plainest and most easy way of producing that for which he claims a monopoly; and to make the public acquainted with the mode which he himself adopts. If a person, on reading the specification, would be led to suppose a laborious process necessary to the production of any one of the ingredients; when, in fact, he might go to a chemist's shop and buy the same thing

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as a separate simple part of the compound, the public are misled. If the results of the recipes, or of any one of them, may be bought in shops, this specification, tending to make people believe an elaborate process essential to the invention, cannot be supported. The plaintiff must be called

Nonsuit.(a)

Scarlett, Gurney, Deacon, and Powell for the plaintiff.

The *Solicitor-General* and *Campbell* for the defendant.

(a) Vide Bull. N. P. 76. *Turner v. Winter*, 1 T. R. 602. *Boulton and another v. Bull*, 2 H. Bla. 463. *Harmer v. Playne* and another, 11 East, 101. *Hill v. Thompson*, 8 Taunt. 375. and *R. v. Wheeler*, 2 B. & A. 345.

GUILDHALL,
Dec. 17, 1823.

VAN WART v. WOLLEY and others.

Where a verdict had been found subject to a special case, and a new trial had been directed, held that the special case, signed by the counsel on each side, was evidence of the facts there stated.

THIS case had been tried before ABBOTT Ld. C. J. at the adjourned sittings after *Hilary* Term, 1822, and a verdict taken for the plaintiff, subject to the opinion of the court on a special case. Upon it's being called on for argument in the court above, it appeared that a material fact was not stated in the special case, upon which the court directed a new trial, in order that all the facts necessary to raise the point of law might be found by the jury.

Scarlett, for the plaintiff, offered in evidence the special case, signed by the junior counsel of each

side on the former trial, as evidence of all the facts there stated.

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VAN WART
v.
WOLLEY

The *Solicitor-General* objected to this, and contended that it was not admissible evidence, but that all the facts should be proved anew.

The case of *Edmunds v. Newman* (a) was cited by the plaintiff's counsel.

ABBOTT Ld. C. J. held the evidence admissible, inasmuch as the special case so signed must be considered as containing the admissions of the parties to the facts therein stated.

The facts originally omitted in the special case having been proved, the jury were directed to find a verdict for the plaintiff, subject to a case containing all the facts in the original case, together with the additional facts then proved.

Scarlett and *Chitty* for the plaintiff.

The *Solicitor-General* and *Abraham* for the defendant.

(a) This case having been sent down for a second trial, came on before ABBOTT Ld. C. J. at the sittings after *Hilary* Term, 1823. The plaintiff's counsel offered in evidence the special case, signed by the counsel on each side, as an admission by the defendant of the facts therein stated. To this the defendant's counsel objected. ABBOTT Ld. C. J. thought the special case evidence of all the facts therein stated, and it was accordingly admitted.

1823.

GUILDHALL,
Dec. 23, 1823.

HAWES and another, v. WATSON and another.

A wharfinger, who, on receiving an order from A. to "transfer, weigh, and deliver or rehouse" certain tallows to B., with an indorsement by B. to "transfer, weigh, and deliver" them to the plaintiffs, gives a written acknowledgement to the plaintiffs, that he holds the tallows on their account; cannot, upon B. becoming insolvent, set up as a defence for not delivering the tallows to the plaintiffs A.'s right to stop in transitu; the plaintiffs having purchased *bonâ fide* from B., although A. sold to B. at so much *per cwt.*, and the tallows have not been weighed.

Semble. An owner of goods lying in wharf, who, upon sale of them, gives an order on the wharfinger to "transfer, weigh, and deliver or rehouse" them to his vendee, loses his right to stop in transitu against all who acquire a *bonâ fide* title by purchase from such vendee.

TROVER for 79 casks of tallow.

The plaintiffs had, on the 25th of September, 1823, bought of *Moberly* and Co., merchants in the tallow trade, 300 casks of tallow at 40s. *per cwt.* the amount to be settled for by the buyer's acceptance at six months' date, allowing fourteen days' discount. One hundred casks of tallow were delivered on the 26th, and plaintiffs gave their acceptances to the amount of 1440l. In order to complete the contract, *Moberly* and Co., on the 26th, bought of *Raikes* and Co. 100 casks of tallow *ex Matilda*, lying at *Watson's Wharf*, at 41s. *per cwt.*, the amount to be paid in money, allowing $2\frac{1}{2}$ *per cent.* discount, and fourteen days for delivery. At the time of this sale *Raikes* and Co. gave *Moberly* and Co. an order on the defendants, who were wharfingers, and then held the tallow on account of *Raikes* and Co., in these terms:—

Sept. 26, 1823.

"Transfer, weigh, and deliver or rehouse to *Moberly* and Co. 100 casks of tallow, *ex Matilda*, casks marked H. and M. Nos. from 94 to 198 (specified.)"

Moberly and Co. made an indorsement on this order, directing defendants to "transfer, weigh, and deliver" the tallow to plaintiffs. On the 27th

Moberly and Co. delivered the order so endorsed to the defendants, who at their request gave them the following note : —

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“ *Watson's Wharf, Sept. 27th, 1823.*

“ Messrs. *T. and B. Hawes,*

“ We have this day transferred to your account, by virtue of an order from Messrs. *Moberly* and *Bell*, 100 casks of tallow, *ex Matilda*, with charges from *October* 10th, 1823. H. and M. casks.

“ For *Watson* and *Metcalfé,*

“ *Wm. Bowness.*”

This note *Moberly* and *Bell* delivered to plaintiffs, who upon the receipt of it gave their acceptances for the amount, which *Moberly* and Co. afterwards got discounted, and plaintiffs at maturity paid.

The defendants delivered twenty-one casks of this tallow to plaintiffs' order, but *Moberly* and Co. becoming insolvent on the 11th of *October*, *Raikes* and Co. gave notice to defendants to retain the remainder, insisting on their right to stop *in transitu*.

The tallows were not weighed until after 13th or 14th of *October*, but *Moberly* and *Bell* paid *Raikes* and Co. 1300*l.* on the 11th of *October*, the original check, dated and given 10th *October*, having been refused payment, on account of some alteration on the face of it. This 1300*l.* was at that time supposed to be about the price of the 100 casks. The full price on weighing turned out to be 1500*l.*, and *Raikes* and Co. stopped *in transitu* for the balance.

The usage in the tallow trade, as proved at the trial, is, to weigh at the Custom-house on landing,

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to ascertain the duties, but whilst in warehouse tallows are sold and resold in the market usually without weighing until the ultimate buyer takes them out for use; fourteen days are allowed for weighing and delivery, during which time it is at the choice of the buyer, but at the seller's expence, to weigh; on the 14th day the seller may have them weighed, and he is no longer liable for charges.

Upon these sales transfer notes of the form specified are usually given, and considered in the market as conclusive evidence of the property.

The wharfage charges had been paid, and the plaintiffs, upon making their demand for the 79 casks of tallow, had tendered for any charges that might be due; and defendants, upon reference to their books, said there was nothing due, but that they detained the casks for *Raikes* and Co.

The *Attorney-General* insisted, that the delivery was not complete, to divest *Raikes* and Co. of their right to stop *in transitu*, until weighing, that being necessary to ascertain the price, and cited *Hanson v. Meyer*, 6 East, 614, *Shepley v. Davis*, 5 Taunt. 617.

ABBOTT Ld. C. J. Those cases are between vendor and vendee; whatever the question may be between buyer and seller, I am most clearly of opinion that the defendants, having acknowledged the transfer to the plaintiffs, cannot now resist this action.

Verdict for plaintiffs.

Gurney, *Gazelle*, and *Carter* for the plaintiffs.
Copley S. G. and *Scarlett* for the defendants.

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In *Hilary* Term following the *Attorney-General* moved for a rule to show cause why this verdict should not be set aside, and a new trial granted, and relied on the same cases as at the trial.

The Court refused the rule, and upon giving judgment,

ABBOTT Ld. C. J. said, I do not mean to decide any question between buyer and seller; for aught I know, the defendants may be liable both to *Raikes* and Co. and to the plaintiffs; but if after such an acknowledgment made by the defendants, and the price of the tallows paid by plaintiffs upon the faith of it, we were to say that the *defendants* could resist this action, we should go far to interrupt the whole course of mercantile dealings.

BAYLEY J. This case appears to me to be perfectly distinct from the ordinary case of vendor and vendee. When goods are sold upon credit to a person who before the complete delivery becomes insolvent, it is consistent with equity and good faith, that the vendor should have the power to stop the delivery of goods for which he has no chance of being paid. But there are many cases which go to show that this right cannot be exercised to the prejudice of third persons; and it is not consistent with equity and justice that it should be enforced against a second *bonâ fide* vendee, who has actually paid the full price for the goods. Here *Raikes* and Co. have, by their order of delivery, given to *Moberly* and Co. the complete power over these goods, and have enabled them, according to the

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the course and usage of trade, to go into the market and sell them again. Having given them this evidence of title to the property, they cannot as against third persons come forward and claim to stop *in transitu*, and the letter of the defendants is conclusive in this case against their right to resist the claim of the plaintiffs.

HOLROYD and BEST Js. concurred. (a)

(a) The first case which recognised the right of stoppage *in transitu* was the case of *Wiseman v. Vandeputt*, in Chancery, 2 Vern. 209. It is now become the clear, known, and established rule in courts of law, that the vendor may seize the goods *in transitu*, if the vendee become insolvent before the delivery of them.

The distinctions upon reference to which the principal case is to be determined, arise from the various circumstances of constructive delivery, which exist, where the commodities sold continue in the possession of the vendor, or a wharfinger, and have not come into the manual custody of the vendee. Where nothing remains to ascertain the individuality, quantity, or price of the commodity sold, the principle of law is clearly defined, that in such a case a delivery order, given to a wharfinger who has the charge of the goods sold, even though he makes no transfer in his books to signify that he holds the property for the vendee, precludes the exercise of the right of stoppage *in transitu*. *Harman v. Anderson*, 2 Campb. 243. *Lucas v. Dorrien*, 7 Taunt. 278. Nor in such case would the payment of the warehouse rent, according to the custom of trade by the vendor or the vendee, affect the right of stoppage *in transitu*. *Hammond v. Anderson*, 1 N.R. 69. Though the receipt of rent by the vendor, the goods continuing in his own possession, is held to determine the transitus. *Hurry v. Mangles*, 1 Campb. 462.

A class of cases which it has been usual to refer to the law of stoppage *in transitu*, have been decided on a ground totally independent of it. As trover can only be maintained for specific goods, unless their individuality can be ascertained, the action of trover cannot be resorted to in respect

of them, and their identity not being known, the stopping of them *in transitu* is not in the nature of things possible; this usually occurs where, consistently with the contract, any commodities of the vendor, answering a particular description, might be supplied; and in these cases the vendee, though he were solvent, could not maintain trover. The principle of these cases is clearly developed in the judgment of the court in *Austen v. Craven*, 4 Taunt. 644. *White v. Wilks*, 5 Taunt. 176. See also *Busk v. Davis*, 2 M. & S. 397. *Wallace v. Breeds*, 13 East, 522. The case of *Whitehouse v. Frost*, 12 East, 614., does not appear to be reconcilable with the latter decisions upon this subject.

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There is another class of cases, where a particular parcel of goods is sold, so that the identity of them is certain, but the quantity and the price remain to be ascertained; this usually occurs where weighing, or the searching of casks, or some circumstance of the like nature is to precede the delivery. In these cases there is no objection to the action of trover, arising from the uncertainty of what the identical goods are for which the action is brought; but still they are not cases of stoppage *in transitu*, because the objection to an action brought for them by the vendee, is that a condition precedent must be performed, before he is entitled to them, with which nobody but the vendor can dispense.

It is fully settled by the decisions, that an order given to a wharfinger to weigh and deliver, will not divest the vendor's right until the commodity is weighed. *Withers v. Lys*, 4 Campb. 237. *Shepley v. Davis*, 5 Taunt. 617. Neither, if part of the goods be weighed and delivered, will it affect the right of the vendor as to the residue which is unweighed. *Hanson v. Meyer*, 6 East, 614. It is still to be decided, whether the introduction of the word *transfer* into the delivery order will vary the case. It must however be observed, that both the cases under this and the preceding head, are frequently considered as strictly cases of stoppage *in transitu*, and that the rule applicable to them is, that where any thing remains to be done between the vendor and vendee, the right is preserved; and in this point of view the decision of *Whitehouse* and *Frost* is in unison with all the other cases, because nothing remained to be done between the vendee and subvendee, and the vendor was not concerned in the action. It may here be mentioned, that the right continues, although a part of the price of the

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goods has been paid. *Hodgson v. Loy*, 7 T. R. 440., and though a bill of exchange has been accepted for the whole, and indorsed over. *Feise v. Wray*, 3 East, 93.

So much of the law of stoppage *in transitu*, as is applicable to the present case, when viewed with reference to the rights of the original vendor and vendee having been examined, it may be next considered with reference to the rights of third parties, and the liabilities of the wharfinger.

In bills of lading, where nothing remains to ascertain the identity, quantity, or price of goods purchased, an indorsement of the bill of lading for a *bond fide* consideration, will put an end to the right of stoppage *in transitu*. See this doctrine and its qualifications, *Lickbarrow v. Mason*, 2 T. R. 63. *Cuming v. Brown*, 9 East, 506. *Salomons v. Nissen*, 2 T. R. 674. The application of the rule respecting bills of lading to the case of public dock warrants, the indorsement of which, by the custom of trade, passes the property in the market, has been considered in some recent cases. *Lucas v. Dorrien*, 7 Taunt. 278. *Zwinger v. Samuda*, 7 Taunt. 265. 1 B. M. 12. *Keyser v. Sase*, 1 Gow. 58. *Spear v. Travers*, 4 Campb. 251. In which cases the leaning of the courts decidedly was, to place such dock warrants upon the same footing as bills of lading; and the case in *Gow*. is a decision to that effect, though in the other cases either the circumstance of fraud has occurred, or it has appeared that notice was given to the Dock Company of the transfer. No case however has gone the length of determining, that the indorsement of a dock warrant from *A.* to *B.* would put an end to the right of stoppage between *A.* and *B.* Although in *Lucas v. Dorrien* it was considered, that the property would no longer, after such an indorsement, be considered in the order and disposition of *A.*, within the scope of the bankrupt laws.

It is apprehended that the indorsement of the delivery note, directed to a private wharfinger, but not delivered to him, would not prevent the right of stoppage *in transitu*. *A fortiori*, not when the order was for weighing and delivering, in which latter case it is conceived the right of the vendor would not be altered, though the note was lodged with the wharfinger, and notice was given him of the indorsement, and he had transferred the property before weighing it to the indorsee. *Shepley v. Davis*, 5 Taunt. 621.

There is another class of cases, of which the principal case

may now be considered a leading one, and that is, where the wharfinger is considered to have attorned to the vendee. *Stonard v. Dunkin*, 2 Campb. 344. This case, and the principal one, clearly shew, that without reference to the right of the vendor, where the wharfinger gives a document to the vendee, or subvendee, which enables him to gain credit for the goods in the world, there the wharfinger is estopped from setting up the vendor's right. How far (a case being supposed where the vendor retains a right of stoppage, as where he gives an order to weigh and deliver) the wharfinger, by receiving rent from the vendee or subvendee, may be considered to have attorned to him, does not appear from the authorities. (See however *Hammond v. Anderson*, 1 N. R. 69., and *Hurry v. Mangles*, 1 Campb. 452). It would seem that the transfer made in his own books could not have that effect.

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HAWES
v.
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LATHAM and others, v. RUTLEY and others.

GUILDHALL,
Monday,
Jan. 5, 1824.

THIS was an action against common carriers, for the loss of a parcel containing country bank notes, amounting to 1340*l.* delivered to them for the purpose of being carried from *London* to *Dover*.

It appeared that the plaintiffs, who were bankers at *Dover*, had agreed with the defendants for the carriage of all parcels, at one guinea per week, from and to *London*. In order to show the terms of this agreement, several receipts, which had been given by the defendants to the plaintiffs at *Dover*, were put in and read, of one of which the following is a copy:—

“ Received of *Latham* and Co. a paper parcel, directed to Messrs. *Hoare*, *Barnett*, and Co., 62.

Held that the following memorandum
“ Received of L. and Co. a paper parcel directed to Mess. H. B. and Co., 62, Lombard-Street, value 260*l.* which we agree to deliver to them to-morrow, fire and robbery excepted; carriage paid here,” given by a carrier, on the receipt of goods, was admissible in evidence, without a stamp, as being not exceed 20*l.*

an agreement, the subject matter of which did

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LATHAM
v.
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Lombard-Street, value 260*l.*, which we agree to deliver to them to-morrow, fire and robbery excepted. Carriage paid here.

(Signed)

“ *R. Rutley*, for

“ *Rutley and Co.*”

Marryatt, upon the plaintiffs offering this memorandum in evidence, contended that it was an agreement between the parties, the subject matter of which exceeded the value of 20*l.*, and consequently that it could not be received in evidence without a stamp.

The *Solicitor-General* and *Denman* contended, that this memorandum required no stamp, because the subject matter of the engagement was not the value of the parcel, but the price of the carriage, and this was under 20*l.*; and they cited the case of *Chadwick v. Sills* (a) in support of their argument.

ABBOTT Ld. C. J. was inclined to doubt whether this agreement was admissible evidence without a stamp, but on the authority of *Chadwick v. Sills* admitted the evidence.

The cause was compromised.

The *Solicitor-General*, *Denman C. S.*, and *Kaye*, for the plaintiffs.

Marryatt, *Gurney*, and *Ryland* for the defendants.

(a) See this case reported in the following page.

1823.

CHADWICK v. SILLS and others. (b)

SITTINGS AFTER TRINITY TERM, 1821.

GUILDHALL.

Assumpsit. The declaration stated that the defendants were wharfingers in *London*, and that in consideration that the plaintiffs would deliver to them 15 chests of lac dye, to be shipped from their wharf, in order that they might be conveyed to him at *Leeds*, for reasonable wharfage, &c. The defendants undertook to ship them four in a ship; that they had shipped them all in one ship, which, together with the plaintiff's goods, was lost on the voyage.

A memorandum by a wharfinger of the receipt of goods to be shipped in a particular manner, may be given in evidence to show the terms on which they were received, without a stamp, although the value of the goods was above £01.; the wharfage being of a less amount.

The lac dye was of the value of about 600*l.*; the wharfage for shipping the 15 chests was 7*s.* 6*d.*

In order to show the terms on which the defendants received the goods, the plaintiff's counsel offered in evidence an unstamped paper, in the following form:—

“ 3. *Cranes' Wharf, Thames-Street.*

“ Received 15 chests lac dye, (then followed the number and marks of the chests to be forwarded). To be forwarded four in a ship, to Mr. *Chas. Chadwick*, dyer, *Leeds*.

“ 9 Feb. 1820. Fifteen Chests, *W. B.*

“ From *Wilkinson and Co.*, 138. *Leadenhall-Street.*”

This paper, without the words “ Fifteen chests,

(b) We have been favoured with a note of this case by one of the counsel in the cause.

1823.

W. B. had been delivered by *Wilkinson* and Co., the plaintiff's brokers, with the goods to *W. B.*, the defendant's clerk, who had added these words, and returned the paper to the porter.

The defendant's counsel objected that this paper required a stamp, as it was offered as evidence of an agreement.

For the plaintiffs it was answered, that the Stamp Act (55 G. 3. c. 184. Schedule, Part I.) required a stamp only "where the matter of the agreement is of the value of 20*l.* or upwards." Here the matter of the agreement is the wharfage and shipment of 15 chests of lac dye, the value of that is 7*s.* 6*d.* only. To hold that a stamp duty of 1*l.* was payable on such an instrument as this, would be to prohibit the use of written memoranda in all such cases, which would cause great inconvenience to commerce, without any benefit to the revenue.

In reply it was contended, that the matter of this agreement was the 15 chests of lac dye, which were of the value of 600*l.*, and that the plaintiff could not be allowed to say that the matter of the agreement was under the value of 20*l.*, and at the same time seek to recover 600*l.* for the breach of it.

HOLROYD J. with some doubt admitted the evidence, and the plaintiff had a verdict for 580*l.*

Denman and *Maule* for the plaintiff.

Scarlett and *Campbell* for the defendant.

In the following term *Scarlett* moved for a new

trial, on the ground of the unstamped paper having been improperly admitted in evidence. But the court refused the rule to show cause, being of opinion that a stamp was not necessary.

1824.

MATSON and another v. TROWER and another.

GUILDHALL,
Jan. 6, 1824.

Assumpsit on an award.

A dispute having arisen between the plaintiffs and the defendants as to the non-performance of a contract to deliver fifty puncheons of brandy; the matter in difference was referred to two persons in the spirit trade.

The arbitrators disagreed, and appointed an umpire, who was also in the spirit trade.

The umpire received from the arbitrators, statements of the points in which they disagreed; examined each of the parties in the absence of the other; and made a written award in these terms:

Award held good though made by an umpire, the arbitrators having no authority to appoint one, and though he examined the parties separately, they having attended him, and made no objection.

Award held sufficient, though in the form of an opinion.

“ I am of opinion that Messrs. *Matson* and Co. are entitled to claim of Messrs. *Trower* and Co. 184*l*. for non-performance of their contract for fifty puncheons of brandy.”

For the defendants it was objected, 1st. That the umpire had no authority. 2dly. That the award was void in consequence of the umpire having examined the parties in the absence of each other. 3dly. That this was the statement only of

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 v.
 TROWER.

an opinion, and not an order or direction to pay the money, and consequently no award.

ABBOTT Ld. C. J. The parties have recognised the authority of the umpire by submitting to be examined by him, as to the matters in dispute. It does not appear that either party desired to be present when the other was examined; legal men indeed usually examine one party in the presence of the other, but among mercantile persons a different practice prevails; the umpire here was a mercantile man, and the defendants not having expressed a desire to be present at the examination of the plaintiffs, cannot now object to its having taken place in their absence. The words of the instrument are indeed not formal or technical, but they amount in substance to an award.

Verdict for the plaintiffs, 134*l*.

The Attorney General and Parke for the plaintiffs.
Scarlett and Barmwall for the defendants.

GUILDHALL,
 Jan. 7, 1824.

WILLIAMS v. MUNNINGS.

A letter, which had been in the possession of the defendant, was filed in the Court of Chancery pursuant to an order of that court: held

THE plaintiff having given notice to the defendant to produce a letter in his possession, proposed to give secondary evidence of its contents.

To this the *Attorney General* objected, and proved by the solicitor of the defendant, that the
 that secondary evidence of it was not admissible, it being in the power of either party upon application to that court, to produce it.

letter in question was delivered to him for the purpose of this action, and of a suit which was depending in equity between the same parties; that the letter was now filed in the Court of Chancery, pursuant to an order of that court, for that purpose.

1824.
WILLIAMS
v.
MYNNINGE.

ABBOTT Ld. C. J., was of opinion that the plaintiff was not entitled to give secondary evidence of the contents of the letter; that the letter was as much in the possession of one party as of the other. Either party might, on application to the Court of Chancery, have obtained permission to produce it.

SHAW and others, Assignees, v. WILLIAMS.

GUILDHALL,
Jan. 8, 1824.

TROVER for a ship, by the plaintiffs, as assignees of *Robertson*, a bankrupt.

A commission issued at the instance and request of the bankrupt good at law.

The counsel for the defendant having endeavoured to show, by the cross examination of the witnesses for the plaintiffs, that the commission issued by the desire and at the request of the bankrupt,

Scarlett, for the plaintiffs, contended that it would not invalidate the commission, if that point were established.

ABBOTT Ld. C. J. As at present advised, I am of opinion that it will not avoid a commission in a court of law, that the commission issued by the

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 SHAW
 v.
 WILLIAMS.

desire and at the request of the bankrupt. A concerted act of bankruptcy clearly will, for that is, in fact, no act of bankruptcy. (a)

Verdict for the plaintiffs.

Scarlett and Wilde for the plaintiffs.

The *Attorney General, Gurney, Campbell, and Justice*, for the defendant.

(a) In *ex parte Staff, Buck's* B. C. 249., the Vice-chancellor refused to supersede a commission on the ground that it issued at the instance of the bankrupt. In *Buck's*, B. C. 431. the chancellor, on appeal from this order, decided, that the commission so issued could not stand, and directed it to be superseded. In *ex parte Grant*, 1 Glyn. and Jam., B. C. 17., where a similar question arose, the Vice-chancellor, after consulting the Lord Chancellor, superseded the commission, "because it was against the spirit and principle of the law, that the bankrupt should procure a commission to be issued against himself; and that it was therefore fit, as a measure of general policy, to adopt as an invariable rule, that no commission should be permitted to stand, *though good at law*, which had been issued at the solicitation of the bankrupt." In this case, as well as in *ex parte Staff, Buck's*, B. C. 431., the principle that the commission was *good at law* appears to have been indirectly recognised.

ADJOURNED SITTINGS AT WESTMINSTER.

WESTMINSTER,
 Jan. 19, 1824.

REX v. HALSE.

In indictments for misdemeanours at the instance of private prosecutors, when both defendant and prosecutor have brought down their records, and entered them with the marshal, the defendant's first, the prosecutor's lower in the list, trial must take place in the order of entry.

UPON calling on this case, it appeared that there were in the marshal's list two indictments for mis-

demeanours, originally found in the county of *Middlesex*, at the instance of the same prosecutor; that both the prosecutor and the defendants had brought down their records, but that the defendants had first entered their records with the marshal in the following order, *Rex v. Halse*, and *Rex v. Hitchens*; then followed in the marshal's list, the entry of the prosecutor's records in the reverse order, viz. *Rex v. Hitchens*, and *Rex v. Halse*.

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Rex
v.
Halse.

Scarlett, as counsel for the prosecutor in both cases, contended, that where a prosecutor and defendant had both entered records, the prosecutor had a right to elect in what order the case should be tried, as in civil cases, where the plaintiff and defendant happen to carry down records at the same time, the trial shall be by the plaintiff's record, although entered subsequently in the marshal's list to that of the defendant, and stated this according to his experience to have been the rule universally adopted in criminal cases, though he was not able to cite any authority.

The *Attorney General* resisted the application, and contended that the cases must be taken as they stood in the marshal's list.

ABBOTT Ld. C. J. As no authority has been cited by the counsel for the prosecutor to support the practice for which he contends, I see no reason for disturbing the established rule, that causes should be tried in the order in which they are entered. The *Attorney General*, when he

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 Rex
 v.
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appears for the crown, has in all cases his election, and in civil causes the terms of the proviso give the plaintiff precedence. But I cannot see that in the case of private prosecutions it would conduce to the better administration of justice to frame a new rule. (a)

Scarlett, Gaselee, and J. Parke, for the prosecution.

The *Attorney General, Gurney, and Wilde*, for the defendant.

(a) In all civil actions, if both plaintiff and defendant carry down records, the trial shall be by the plaintiff's record, Tidd's Prac. 7th edit. 802., unless, indeed, the entry of the plaintiff's record is a nullity from his having omitted to give due notice of trial. *Brown v. Ottley*, 1 B. & A. 253. In civil cases the trial by proviso is only grantable to the defendant in cases where there has been laches in the plaintiff, *Dyer*, 215. *b. Stam. P. C.* 155.; except where the defendant is considered as an actor, as in replevin, prohibition, and *quare impedit*, 2 Hawk. c. 41. s. 10. But in criminal cases, where an indictment is removed by *certiorari*, at the instance of the defendant, he is bound by the recognizance he enters into under the statutes 5 W. & M. c. 11. and 8 & 9 W. 3. c. 33. "to cause and procure the issue joined therein to be tried at the next assizes after such *certiorari* is returnable;" or if the indictment is found at the sessions in *London, Westminster, or Middlesex*, he is bound to try in the next term after the *certiorari* is granted, or next sittings after that term, "if the Court of King's Bench shall not appoint any other time for the trial thereof." Where the indictment is returned into the King's Bench, by a grand jury of the county of *Middlesex*, although the above statutes are in no way applicable, still the defendant enters into a recognizance to try the indictment or information at the sittings next after the term in which the indictment has been found. In these cases the defendant, in order to fulfil the term of his recognizance, ought to take down his record, and enter it with the

marshal, lest the prosecutor should fail to do so. But these statutes have no relation to an indictment removed at the instance of the prosecutor, where, after one default made by him, the defendant makes up the record by proviso. Previous to the above decision it might have been doubted whether in such a case, if both records had been brought down, the trial should not in analogy to civil proceedings, have taken place by the prosecutor's record. See *R. v. Sir J. Banks*, 2 Salk. 652. *Rex v. Macleod*, 2 East. 206. (n. a.)

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REX
v.
HALES.

CASES

ARGUED AND DETERMINED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

HILARY TERM,

5 GEO. IV.

ADJOURNED SITTINGS AFTER TERM AT
WESTMINSTER.

WESTMINSTER,
Feb. 17, 1824.

RIVIERE *v.* BOWER.

Where the owner of a house divided it into two tenements, and let one of them; held that the lessee was liable to an action on the case for obstructing windows existing in the landlord's house at the time of the demise, though of recent construction, and though no stipulation was made against the obstruction.

Action on the case.

The plaintiff was proprietor of a house in Oxford-street, which he divided into two tenements; one he retained in his own occupation, using it as a gunsmith's shop, with a window projecting, so as to display his goods, by a side view, to passengers going up and down the street.

In 1817, after the window had been constructed, he let the adjoining tenement to the defendant,

the time of the demise, though of recent construction, and though no stipulation was made against the obstruction.

who was a bookseller and stationer. The defendant was in the habit of fixing, by a screw to his door-post, a moveable case, containing books, which came so near to the plaintiff's window, as to prevent his putting up the side shutter until the case was removed, which was usually not until a late hour. It had also the effect of obstructing entirely the view of the goods on one side of the window.

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RIVERMAN
v.
BOWEN.

On the part of the defendant it was objected, that the action for obstructing the air and light admitted through a window was not maintainable, unless the window was ancient, and with respect to the display of the goods. 9 Co. R. 58. was cited, where it was held that no action would lie for the obstruction of a prospect; and it was contended that the same principle applied to the grievance here complained of.

ABBOTT Ld. C. J. held that the action was maintainable against a person holding as tenant, for an obstruction to a window existing in the landlord's house at the time of the demise, although of recent construction, and that although there should be no stipulation at the time of the demise against the obstruction.

Verdict for the plaintiff.

Scarlett for the plaintiff.

Denman C. S. and *Chitty* for the defendant.

Vide Compton v. Richards, 1 Price, 27, where it was held that the occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special

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action on the case for an obstruction to his window lights, caused by the defendant's adding to his own building, however short the period of previous enjoyment of the plaintiff. See also 2 Saun. 113. a. and *Palmer v. Fletcher*, 1 Lev. 123.

WESTMINSTER,
 Feb. 20, 1824.

RUSSEN v. LUCAS and another, Sheriff of
 Middlesex.

A sheriff's officer having a writ against A. B., tells him that he has a writ against him, upon which A. B. says, "Very well, I will come to you immediately," and shortly afterwards makes his escape, without having been touched by the officer: held that this was no arrest.

THIS was an action against the late Sheriff of *Middlesex* for the escape of one *Hamer*, arrested on final process.

The facts offered in evidence to prove the arrest were these. *Hamer* and several other persons were sitting in a box in a coffee-room, when *Ball*, an officer, charged with the execution of the sheriff's warrant on the *ca. sa.*, came to the box, at the further end of which *Hamer* was at that time sitting. *Ball*, holding in his hand some papers, addressed himself to *Hamer*, saying, "Mr. *Hamer*, I want you. I have a writ against you." Upon which *Hamer* replied, "Very well, I will come to you immediately in the passage." One of the persons in the box, by name *Oldfield*, remonstrated with *Ball* upon his interference with the company. Upon which *Ball* told *Oldfield* that he had also a writ against him. *Ball* and *Oldfield* then went into a passage adjoining the coffee-room, and staid for a few minutes. Upon the return of *Ball* to the box, he found that *Hamer* was gone. The officer never touched the body of *Hamer*, and never approached nearer than the table at the further end of which *Hamer* was sitting.

ABBOTT Ld. C.J. I am of opinion, upon the authority of *Genner v. Sparkes* (a), that bare words will not make an arrest. Here though *Hamer* acquiesces in words, yet he does not accompany the officer, but keeps his seat, till the officer has quitted the room, and then immediately avails himself of that opportunity to make his retreat. If the parties, upon affidavit of these facts, had applied to me for an escape warrant, I, unquestionably, should have refused to grant one. I entertain no doubt on the question.

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Plaintiff nonsuited. (b)

Marryatt and Tindal for the plaintiff.

The *Attorney General* and *Cottingham* for the defendants.

(a) 1 Salk. 79.

(b) Vide *Arrowsmith v. Le Mesurier*, 2 New Rep. 211. Bull. N.P., 62.

REX v. DEACON and others.

WESTMINSTER,
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THIS was an indictment for a forcible entry. There was no averment that the entry was made "*manu forti*," and no conclusion "*contra formam statuti*." The prosecutor had no counsel, but appeared as a witness.

A jury sworn on an indictment, clearly bad in point of law, may be discharged by the judge from giving a verdict.

The jury having been sworn,

Chitty, for the defendants, after pointing out the invalidity of the indictment, for the reasons

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above stated, insisted that the prosecutor should proceed with his case, in order that the defendants, who intended to institute proceedings for a malicious prosecution, might have the benefit of an acquittal by a jury.

ABBOTT Ld. C. J. The court has an undoubted authority to use a discretion as to the propriety of proceeding in the cases that may be brought forward for trial. I think it a fit exercise of that authority to discharge the jury from trying this indictment. It is unquestionably bad in point of law, and it would be therefore altogether useless to take the opinion of the jury upon the facts. The defendants ought either to have demurred, or to have moved to quash the indictment.

The jury were accordingly discharged. (a)

Chitty for the defendants.

(a) Judges have frequently refused to try *frivolous and idle questions*, in which the parties had no interest. *Brown v. Lee-son*, 2 H. Bl. 43. *Henkin v. Geras*, 2 Camp. 408. *Ditchburn v. Goldsmith*, 4 Camp. 153. Questions of an illegal or immoral tendency are within the same principle. *Squires v. Whisken*, 3 Camp. 141. In the case of *Burn v. Taylor*, Sittings at *Westminster*, 1823, which was an action brought to recover stakes deposited with the defendants, for the purpose of an intended prize fight between the plaintiff and a third person, *Abbott* Ld. C. J. refused to allow the trial to proceed, and discharged the jury; observing, that it would be highly injurious to society, that a court of justice should countenance public exhibitions of such immoral and pernicious tendency, by discussing contracts formed with a view to them.

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SIMONS v. SMITH.

WESTMINSTER,
Feb. 23, 1824.

ACTION for the non-performance of a contract to repair the plaintiff's gig.

In an action against one of several partners, the defendant cannot, by a release, make his partner a competent witness for him.

Scarlett, for the defendant, called a witness, who, on the *voir dire*, admitted that he and the defendant were in partnership as coach-makers. *Scarlett* proposed that the defendant should release him.

ABBOTT Ld. C. J. refused to allow this, and said, that one partner could not release another for the purpose of making him a competent witness in a particular action.

Verdict for the plaintiff.

The *Attorney General* and *S. M. Phillips* for the plaintiff.

Scarlett and *D. Pollock* for the defendant.

Vide *Young v. Bairner*, 1 Esp. 103. *Cheyne v. Koops*, 4 Esp. 112.

Doe ex d. SORE v. EKINS.

WESTMINSTER,
Feb. 23, 1824.

EJECTMENT on a forfeiture.

The defence set up was a waiver of the forfeiture. The plaintiff had demised the premises to

The defendant, mortgagee of a term, purchased the mortgagor's whole interest in the

premises, in consequence of the lessor's advice, "to take to the premises, and finish the buildings," given after a right of re-entry had accrued for the noncompletion of the buildings.

Held, that the lessor might maintain an ejectment for the forfeiture against the defendant, the buildings never having been completed, and a sufficient time having elapsed since the purchase for the completion.

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one *Bayley* for a term of years by lease, dated 6th *July*, 1822, with proviso for re-entry for non-performance of any of the covenants, one of which was, that certain buildings should be finished within one month from the date of the lease. On the 8th of *July Bayley* conveyed the premises to one *Wersten*, in trust, to secure the payment of an annuity granted by *Bayley* to the defendant. The buildings were not finished within the time covenanted, and after the forfeiture had accrued, the plaintiff, in a conversation with the defendant, advised her "to take to the premises, and finish the buildings." In consequence of this advice, the defendant purchased of *Bayley*, in consideration of a release of the annuity, and 10*l.* in money, the whole of his interest in the premises. The term was legally assigned to her on the 22d *February*, 1822, and she took possession of the premises. In the *September* following, the defendant proceeded in part to finish the buildings, but they were never wholly completed, nor put into a habitable state.

It had been opened by *Denman* for the defendant, that the whole of the defendant's interest in the premises had been purchased at the plaintiff's recommendation, given after the forfeiture had accrued.

ABBOTT *Ld. C. J.* If it had turned out in evidence that the defendant, not having any previous interest in the premises, had been induced by the plaintiff's advice, given after the forfeiture, to become a purchaser of the lease, I should have thought the plaintiff would have had no right to

insist on the forfeiture as against her. But the facts are very different. The expression, "take to the premises," most clearly refers to an interest then existing; and the meaning of the proposal obviously was, that she should take possession of the premises, and finish them within a month from that time. This she has not done, and therefore has no right, in a court of law, to defeat the claim of the plaintiff.

Verdict for the plaintiff. (a)

Scarlett and Chitty for the plaintiff.

Denman C. S. and Platt for the defendant.

(a) In the case of *Hume v. Kent*, 1 Ball. & Bea. 554., allowing a tenant to lay out money in repairs, with notice of a forfeiture, was held to amount to a waiver of it. In the principal case the lessor's proposal to the defendant was subject to the condition of finishing the buildings; the non-performance of this condition brings the case within the principle of *Doe v. Bliss*, 4 Taun. 735., where it was held that a waiver of a right of re-entry for one under-letting was no waiver of re-entry for a subsequent under-letting; and that a waiver of a right of re-entry for a breach of covenant to repair, is no waiver of a right of re-entry on a subsequent want of repairs. See also *Fryett v. Jeffreys*, 1 Esp. 393.

CLARKE and another, Executors, &c. v.
GANNON.

WESTMINSTER,
Feb. 25, 1824.

ASSUMPSIT to recover debt due to testators.

A witness was called by the plaintiffs, who, on the *voir dire*, appeared to be a legatee under the

In an action by
executors, a
paid legatee
is a competent
witness to in-
crease the estate.

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will, but his legacy had been paid him by the plaintiffs.

Scarlett contended that he was inadmissible, inasmuch as he would be obliged to refund, in case the estate should turn out to be deficient.

ABBOTT Ld. C. J. There is nothing to show that the other funds are not sufficient. This debt has not been paid; but I can not assume that there is not other estate sufficient.

Verdict for the plaintiffs.

Denman C. S. and *Chitty* for the plaintiffs.

Scarlett and *Armstrong* for the defendant.

WESTMINSTER,
 Feb. 25, 1824.

CLARK v. LUCAS and another, late Sheriffs of London.

In an action against the sheriff for negligently executing a writ, an assistant of the sheriff's officer, who had been employed by the officer to execute the writ, is a competent witness for the sheriff, without a release from the officer.

ACTION for a false return to a writ of *fi. fa.*, with a count for negligently allowing goods taken under the writ to be removed.

The plaintiff had proved that, whilst the goods were in the custody of the assistant to the officer charged with the execution of the sheriff's warrant, a considerable portion of them had been removed.

Scarlett, for the defendants, called the assistant, who was objected to by *Wilde* as incompetent, without a release from the officer. He argued, that the case, as it then stood, rendered the sheriff liable for the misconduct of the proposed witness. That the sheriff would have his action against the officer, in case this verdict should be for the plaintiff, and the judgment in this case would be evidence in that action. That the officer would be entitled to compensation from the assistant, and the judgment against the officer would be evidence against the assistant. That, in this way, the assistant had a direct interest in defeating this action.

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Scarlett, in answer, said, that such a circuitry of interest was no objection to the competency of a witness; that it was matter of every day practice to release the officer, but that he had never before heard of an objection to the assistant on such ground.

ABBOTT Ld. C. J. The objection does not amount to a legal ground of exclusion, but is fair matter of observation as to his credit. The rule now established and acted on is, that in order to exclude a person called as a witness, the verdict must be evidence for or against him, and an interest beyond this is too remote to establish incompetency. Here the verdict cannot, in any case, be used against the assistant by the defendants, inasmuch as he was not employed by them; but according to the argument, a second judgment founded on this might affect him. I think that

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does not fall within the rule, and that the witness must be received.

Wilde and Jardine for the plaintiff.

Scarlett and Comyn for the defendants.

ADJOURNED SITTINGS IN LONDON.

GUILDHALL,
Feb. 26, 1824.

WILLIAMS v. MUNDIE and others.

The privilege of not being examined to such points as have been communicated to an attorney while engaged in his professional capacity, extends only to those communications which relate to a cause or suit, existing at the time of the communication, or then about to be commenced.

ASSUMPSIT for goods sold and delivered.

In order to prove that the defendants were partners at the time of the sale of the goods, the plaintiff's counsel called the defendants' attorney, who stated, that prior to the commencement of the present action, and to the period at which the goods were supposed to have been sold, he had been consulted by some of the defendants relative to a partnership then about to be entered into by them.

Scarlett objected to his disclosing what had been communicated to him in his professional character, contending that the privilege of not being examined to such points, extended to all communications made to him with reference to his professional character, during the relation of attorney and client.

ABBOTT Ld. C. J. I think this evidence admissible. The rule I have invariably laid down in cases of this kind is, that what is communicated

for the purpose of bringing an action or suit, or relating to a cause or suit existing at the time of the communication, is confidential and privileged; but what an attorney learns otherwise than for the purpose of a cause or suit, I think he is bound to communicate. This rule was adopted by the court of King's Bench, on a motion for a new trial, in a case that had been tried on the Midland Circuit, in which Serjeant *Adair* was counsel. This is not the first time this question has arisen here, and it is one to which I have given much consideration. Having formed this opinion, I think it unnecessary that the question should be further discussed here. The defendant's counsel may tender a bill of exceptions, or I will in any other way assist him in raising the point for the opinion of the court from whence this record issues.

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Verdict for the defendants.

F. Pollock and *Wylde* for the plaintiff.

Scarlett and *J. Parke* for two of the defendants.

Alderson for the other defendant.

The same point was ruled by *Abbott*, Ld. C. J., in *Wardsworth v. Hamshaw* and another, Sittings after *Hilary* Term, 1819, 2 Bro. & Bing. 5. n., and appears to have been the opinion of Lord *Kenyon* in *Cobden v. Kendrick*, 4 T. R. 431. and *Duffin v. Smith*, Peake's N. P. C. 108. But in *Cromack v. Heathcote*, 2 Bro. & Bing. 4. the Court held that the rule was not confined to attorneys employed in a cause.

See the cases on this subject collected in *Phillipps's Evidence*, vol. i. p. 134. 6th edit., and the conclusion there adopted is, that this privilege is not confined to those cases only where he is employed in a suit or cause, but extends to all such communica-

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tions as are made to him in his professional character, and with reference to professional business. See also the cases collected in the notes to *Parkhurst v. Lowten*, 2 Swanst. Rep. 199. 200.

GUILDHALL,
Feb. 27, 1824.

DOE dem. PITT v. LAMING and another.

Covenant in a lease not to let, set, assign, transfer, set over, or otherwise part with the premises thereby demised, or that present indenture of lease: Held that a deposit with a creditor as a security for money advanced, was not a parting with, within the meaning of the covenant.

EJECTMENT on a forfeiture.

Stephen Pitt, the lessor of the plaintiff, had by lease dated the 12th of *July*, 1802, demised a tenement called the *Grigsby* Chop-house, to recover which this ejectment was brought, to one *William Laming*, for a term of 19 years.

The lease contained the following covenant :

“ That the said *William Laming*, his executors or administrators, should not, nor would at any time or times thereafter, during the continuance of the term thereby granted or intended so to be, grant any under-lease or leases, for any term or terms whatsoever, or let, set, or assign, transfer, set over, or otherwise part with the said messuage or tenement and premises, with the appurtenances thereby demised, or that present indenture of lease, or his or their term or interest by that indenture granted, or intended so to be, or any part thereof, without the special licence, consent, and approbation of the said *Stephen Pitt*, his heirs or assigns, under his or their hands in writing first obtained;” and then followed the usual proviso for re-entry for breach of this covenant.

Laming deposited this lease with Messrs. *Coombe* and Co., brewers, as a security for money advanced by them.

Scarlett, for the lessor of the plaintiff, contended that the depositing the lease with the brewers was a breach of the covenant "*or otherwise part with,*" and that the lessor of the plaintiff was entitled to recover for the forfeiture.

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ABBOTT Ld. C. J. was of opinion that the delivery of the lease to the brewers, as a security for the payment of money advanced by them, was not such a "*parting with*" as to work a forfeiture.

Verdict for the defendants.

Scarlett for the plaintiff.

Gurney and *Hutchinson* for the defendant.

In the following *Easter* Term, *Scarlett* moved to set aside this verdict. But the Court were of opinion that this case did not differ in principle from *Crusoe v. Bugby*, 2 Bla. 766., and 3 Wilson, 234., and refused the rule.

BRUTT v. PICARD.

GUILDHALL,
Feb. 28, 1824.

THIS was an action by the indorsee against the acceptor of a bill of exchange.

The bill, after it was drawn and accepted, was given to a person of the name of *Bennett*, who was the agent both of the drawer and acceptor, to deliver to the indorsee. *Bennett* discovering that the date was *January, 1822*, instead of *January, 1823*, their knowledge or consent, corrected the mistake: Held that such alteration did not vacate the bill.

A bill having been dated by mistake 1822, instead of 1823, the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without

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without again seeing the drawer or acceptor, and before he delivered the bill to the indorsee, altered the figure 2 into a 3.

Storks, for the defendant, contended, that this bill having been altered after it was drawn, and without the knowledge of either the drawer or acceptor, not only required a new stamp, but the alteration vacated the bill, the parties not consenting to it.

ABBOTT Ld. C. J. I shall leave it to the jury to decide, whether this bill was not dated by mistake 1822. If they are of opinion that it was originally the intention of the parties to the bill that it should have been dated 1823, and that the figure 2 was inserted by mistake, I am of opinion that this alteration will not vacate the bill.

Verdict for the plaintiff.

Denman C. S. and *E. Lawes* for the plaintiff.

Storks for the defendant.

Kershaw v. Cox, 3 Esp. N. P. C. 246. See 10 East, 437. *Jacobs v. Hart*; 2 Starkie, 45. *Downes v. Richardson*, 5 B. & A. 674. *Bayley* on Bills, last edition, 89., and *Cowie v. Halsall*, 3 Starkie, 36.

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WARING v. HOGGART.

GUILDHALL,
March 4, 1824.

ACTION against an auctioneer to recover the deposit money on the purchase of some ground rents and leasehold property.

The sale was under an order of the Vice Chancellor.

The estate upon which houses had been erected, and out of which the ground rents issued, belonged to a person of the name of *Brandon*, who had demised the land for a term of years with proviso for re-entry on breach of a covenant in the lease, that the lessee and his assigns should not use or exercise certain obnoxious trades (therein enumerated) on the premises.

The original lessee had erected houses upon the land, but the under-leases which he had granted of these houses contained no covenant against the obnoxious trades provided against by the original lease. The improved ground rents issuing out of the houses so underlet, and leases of other houses already erected, having been put up to auction by the assignee of the original lessee, the plaintiff became the purchaser of the ground rents and of two of the houses. The conditions of sale stated the covenant in the original lease against the obnoxious trades, and that such covenant, together with the usual covenants, would be inserted in the under leases to be granted to the purchasers. No mention was made as to whether these covenants were contained in the under-leases already granted of the houses.

A lessee of lands subject to a covenant against certain obnoxious trades, with a proviso for re-entry, grants under-leases of houses erected on the land, not containing a similar covenant and proviso: Held that a purchaser by auction of houses on the same land, and of the improved ground rents of the houses so underlett, might recover back his deposit money, this omission in the under-leases not having been mentioned in the conditions of sale.

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Scarlett, for the plaintiff, contended that the purchaser was entitled to recover back his deposit money, the title proving defective from this covenant not having been inserted in the under-leases, as the under lessee might by his acts cause the forfeiture of the original lease, and leave the purchaser without any remedy. The conclusion which would generally be drawn from these conditions of sale would be, that the under-leases contained covenants against the obnoxious trades similar to that in the original lease, which turns out not to be the case.

ABBOTT Ld. C. J. I am of opinion that it is the duty of every person truly and honestly to represent that which he is to sell. A careful man and a lawyer looking at these conditions of sale might ask, what were the terms of the leases which had been granted? The purchaser is informed by the statement in the conditions, that the original lessee is restrained from carrying on these obnoxious trades, and that in the leases to be granted to him a similar covenant is to be entered into; none but a very careful person would suppose that it could be doubtful whether the persons to whom under-leases had already been granted, were bound in the same manner. I am, therefore, clearly of opinion that the plaintiff cannot be bound to take this title.

Verdict for the plaintiff.

Scarlett and *Hutchinson* for the plaintiff.

Marryatt for the defendant.

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MARSHALL v. GRIFFIN.

GUILDHALL,
March 5, 1824.

ASSUMPSIT. The four first counts were on bills of exchange. There was a demurrer and joinder to the first and second, general issue as to the residue of the declaration, and *venire tam ad triandum quam ad inquirendum*, &c.

Only two bills were produced, and these having been proved, *F. Pollock*, for the defendant, insisted that as the plaintiff on the execution of a writ of inquiry, is bound to produce the bill or note set out in the declaration, the two bills produced must be applied to the counts which had been demurred to, and damages contingently assessed on them; and as only two had been produced, the defendant would be entitled to a verdict on all the other counts.

ABBOTT Ld. C. J. The reason why a plaintiff is bound to produce the bill or note on an inquiry after judgment by default, is, that the jury may see whether there is any indorsement of payment on it. But on such an inquiry, if no note is produced, the plaintiff is entitled to nominal damages. And so here the plaintiff is entitled to a verdict for the amount of the bills proved on the counts to which the defendant has pleaded, and to 1s. damages on those demurred to, the defendant by his demurrer having admitted the existence of the bills declared on, and put himself to the judg-

Where the four first counts of a declaration were on bills of exchange, and there was a demurrer and joinder to the two first, and general issue to the rest, and *unice taratio*, &c. Held that the plaintiff having proved only two bills, was not obliged to place these to the counts demurred to, but was entitled to nominal damages on those counts, and to the amount of the bills on the rest of the declaration.

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ment of the court, as to his legal liability upon them.

Verdict for the plaintiff.

Marryatt and Comyn for the plaintiff.

F. Pollock for the defendant.

GUILDHALL,
 March 6, 1824.

JENNINGS v. GRIFFITHS.

The registered owner of a ship is not liable for repairs, unless actually done upon his credit. Legal ownership is *prima facie* evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner's having ceased to interfere with the management of the ship.

ACTION for repairs done by the plaintiff, a shipwright, on the brig *Favorite*.

The repairs were done in *June*, 1823, by the orders of *Pellatt*, the commander. The registry made in 1808, at *Beaumaris* in *Wales*, and the affidavit of the defendant, stating himself and another to be joint owners, were proved. The defendant acted as owner and commander till 1821, when he transferred the ship by bill of sale to his son *J. Griffiths*, who became commander, and acted as such till *May*, 1823; *J. Griffiths* then conveyed the ship to *Kenning*, who appointed *Pellatt* commander. No new registry was made of these transfers, but they were indorsed on the certificate of registry kept on board. It was attempted by *Scarlett* for the plaintiff, to show that the conveyance from the defendant to *J. Griffiths*, was not an absolute one of the defendant's whole interest, but that he still continued beneficially interested in the ship. The case of *Dowson v.*

Longford, tried before his lordship at *Guildhall*, in the year 1822, was mentioned.

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ABBOTT Ld. C. J. in summing up to the jury observed: The difficulty which exists in this case arises out of certain acts of parliament relating to the transfer of ships. Particular forms and regulations have been rendered necessary by those statutes, and they have even gone so far as to say that there can be no legal ownership in any person who has neglected to comply with the forms prescribed; one of these is, that the ownership must be registered at the proper office. The object of the legislature in passing those statutes, was clearly one of general policy: namely, to prevent foreigners from participating in the advantages which it was intended to give to British shipping only; and the use of the registry is, to enable the government officers to ascertain, at all times, that the real owners are British subjects. Soon after the passing of those acts, the leaning of courts of law in the construction of them, was, to say that the registered owners of ships should at all events be liable for the repairs. But the subject having become more accurately understood, a better and more correct principle now prevails; and the recent cases have decided that the true question in matters of this description is, "upon whose credit was the work done?" That question would, in most cases, be decided by the fact of legal ownership, the repairs being generally done for the legal owner. But it may so happen that the name of a person may be

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retained on the registry, after he has ceased to be beneficially interested in the ship, or to interfere with its concerns. The question was so left to the jury in the case referred to by the learned counsel for the plaintiff, and I do not consider that any thing, I am now saying can at all impeach the correctness of the decision of that case, the circumstances of which I well recollect. There the registered owner had parted with his interest in the ship, but with a stipulation that he should retain possession of the bill of sale, and receive part of the profits, until the bills, in consideration of which the transfer was made, should be paid. He had himself been in the habit of employing the tradesmen about the ship, and had given no notification to them that his interest in the vessel had ceased. And the jury very properly said, that the work had been done on his credit. But in the case before you, it does not appear that the defendant had the slightest knowledge of the work being done, nor that the plaintiff had any reason to suppose him connected with the vessel; and if he had consulted the register, he would have found another person to have been in joint ownership with him. The repairs were not even ordered by the son, but by the direction of a captain appointed by a stranger to the defendant, and that too whilst he was residing in a distant part of the kingdom. The question for you to consider is,

“ Were or were not these repairs done upon the credit of the defendant.”

The plaintiff's counsel then chose to be non-suited.

Scarlett and Holt for the plaintiff.

Marryatt and R. V. Richards for the defendant.

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Vide Abbott on Shipping, 21. *Rich v. Coe*, Cowp. 636. *Young v. Brander*, 8 East, 10. *Trewhella v. Rowe*, 11 East, 435. *Frazer v. Marsh*, 13 East, 238. *Frazer v. Marsh*, 2 Camp. 518. *Annett v. Carstairs*, 3 Camp. 354. Holt on Shipping, 352.

SECOND ADJOURNED SITTINGS IN LONDON.

DE LEMA v. HALDIMAND.

GUILDHALL,
April 14, 1824.

ASSUMPSIT for work and labour.

The *Spanish* government, in *November*, 1821, entered into a treaty with a house at *Paris*, *Ardoin, Hubbard*, and Co., for a loan. *Ardoin* and Co. disposed of a portion of this loan to the defendant, in consequence of which they became holders of *Spanish* bonds to a very considerable amount. In order to provide against the loss of the bonds by transmitting them to *Madrid*, article 3 of the treaty gave permission to the contractors to get certificates from the consuls in *London* and *Paris* of the bonds having been delivered up, and the *Spanish* government engaged that the bonds should be acknowledged at *Madrid* on presenting such certificate. In 1822 and 1823 the plaintiff, who was the resident consul-general for *Spain* in this country, was applied to by the defendant to give certificates for the bonds which the defendant then held, amounting to nearly

A foreign consul, resident in England, and receiving a salary from his own government, cannot maintain an action for the trouble and labour he has been put to, in transacting business for merchants here, in which he acted as the officer of his own government, and in conformity to their express instructions.

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1,894,120 *British* currency. The plaintiff attended at the counting-house of the defendant for this purpose, and gave certificates for all the bonds. This business was commenced in *March* 1822, and concluded in 1823. The plaintiff, during the time of this attendance, for the purpose of examining the bonds, claimed certain fees for doing the business, which, he stated, did not fall within the ordinary duties of a consul, for which alone he received a salary from his own government. The defendant had promised to pay the plaintiff any thing he might be legally entitled to receive. It appeared that the plaintiff had express instructions from his own government to deliver certificates to the holders of *Spanish* bonds after having examined and verified them.

Scarlett, for the defendant, contended that the action could not be maintained, as the plaintiff had only performed that which fell within the ordinary scope of his duty as consul, and for the performance of which he received a salary from his own country.

ABBOTT Ld. C. J. I am of opinion that this action cannot be sustained. The plaintiff was, in the present instance, acting as the officer of his own government, and in direct conformity to instructions which he had received. In cases where he acts between one individual and another, he may be entitled to receive fees. But here he is acting directly as the officer of his own government.

Nonsuit.

The *Attorney General, Marryatt, and Platt* for
the plaintiff.

Scarlett and Gurney for the defendant.

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DRABBLE v. DONNER.

GUTHRIE,
April 14, 1824.

TROVER. The defendant, who was a foreigner, came to this country in *August* last, and under a judge's order was held to bail in the present action; since which period, until the time of the trial, he had remained in this country, his usual place of residence being *Denmark*. Notice to produce certain letters, which had been written to him when abroad in the year 1806, was served upon him on *Saturday* the 10th of *April*, the trial being on the 14th.

Scarlett, upon the notice being proved, and the plaintiff's being about to give secondary evidence of the contents of the letters, objected on the ground, that sufficient time had not been given to the defendant to procure the original letters which were addressed to him when abroad, and were to be presumed to have been left, where the party was domiciled.

A notice to produce letters written by the plaintiff to the defendant, who was a foreigner, and had been held to bail, upon coming to this country seven months previous to the trial, was served on the 10th of April, the trial taking place on the 14th: Held sufficient to let in secondary evidence of the contents, although the letters were written eighteen years back, and addressed to the defendant at his residence abroad.

ABBOTT Ld. C. J. I have never known this objection raised before. I should think it too dangerous to hold, that secondary evidence is not to be received in cases like the present. It would lead to great inconvenience and delay if trials were

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allowed to be postponed upon objections such as this. I am therefore of opinion that the plaintiff is in a condition to give secondary evidence of the contents of these letters.

Case referred.

The *Attorney General* and *Comyn* for the plaintiff.

Scarlett and *F. Pollock* for the defendant.

GUILDHALL,
 April 15, 1824.

BRANT v. ROBINSON.

In an action of deceit. An insolvent to whom the plaintiff has furnished goods on the representation of the defendant, is a competent witness to prove that the defendant represented him as a person fit to be trusted.

THIS was an action of deceit.

In order to show the insolvency of a person of the name of *Gillingham*, at the time the defendant had represented to the plaintiff that he was a person fit to be trusted, the wife of *Gillingham* was called.

Scarlett, for the defendant, objected to her competency, on the ground that if the plaintiff recovered in the present action, it would discharge the witness's husband from all liability, for the goods which he had purchased of the plaintiff, as a debt could not be paid twice over.

The *Attorney General* for the plaintiff contended, that this being an action to recover damages for a *tort*, could not, in any way, be a bar to another action by the present plaintiff for the breach of this contract with him, and cited *Smith v. Harris*, 2 Starkie, 47.

ABBOTT Ld. C. J. Upon the authority of the case in *Starkie*, I shall admit the evidence.

Verdict for the plaintiff, damages 375*l*.

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v.
ROBINSON.

The *Attorney General* and *Campbell* for the plaintiff.

Scarlett, *Gurney*, and *F. Pollock*, for the defendant.

FULLER and others v. SMITH and others.

GUILDHALL,
April 21, 1824.

ASSUMPSIT. Money had and received.

It appeared that the plaintiffs, who were bankers, had discounted for the defendants, who were bill-brokers, a bill of exchange for 271*l*., and which the defendants did not indorse. It afterwards turned out that the bill, which purported to be drawn by one *Lunn*, and to have been accepted by *Norman* and Co., and indorsed by a person of the name of *Simpson*, was, as regarded the drawer and acceptor, altogether a forgery, and that *Simpson*, the indorser, had absconded and left the country. The plaintiffs were the bankers of *Norman* and Co., and the bill purported to be accepted payable at their house.

The plaintiffs, bankers, discounted for the defendants, bill-brokers, a bill of exchange which the latter did not indorse. The signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged: Held that the defendants were liable to refund the money, and that the fact of their having paid over the amount to the indorsee for whom they were brokers, would not relieve them from their liability.

The *Attorney General*, after having stated that he was in a condition to show that the defendants acted only as the brokers of *Simpson*, and that they paid over the money to him as soon as they received it from the plaintiffs, contended that the defendants were not liable, never having indorsed the bill, but acting merely as agents, they were

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discharged from all responsibility upon paying over the money to their customer *Simpson*, for whom they had been employed to discount the bill.

A witness was then called, to prove that they were mere agents, and that they had paid over the proceeds of the bill to *Simpson*.

ABBOTT Ld. C. J. This is an action to recover 271*l.*, as money had and received by the defendants to the plaintiffs' use. The only question of fact for you to consider is, whether the defendants did pay over the money to *Simpson* in the manner that has been stated. I think, however, that the plaintiffs are, at all events, entitled to your verdict, being of opinion, in point of law, that even if the money was paid over, as has been stated, the defendants are nevertheless liable to the plaintiffs. If you take a bill without an indorsement, you cannot sue the person from whom you receive it, but then you take *it as a bill*; but here, in fact, the instrument on the faith of which the money was advanced, turns out not to be a bill of exchange, as it was represented, being altogether a forgery, and that I conceive to be the distinction.

His lordship directed the jury to find for the plaintiffs, but to inform him, whether they were satisfied the money was paid over to *Simpson*.

The jury found a verdict for the plaintiffs, damages 271*l.*, but stated that they were not satisfied that the money had been paid over to *Simpson*. (a)

(a) In the case of *Jones v. Ryde*, 5 Taunt. 488. it was decided that a person who discounts a forged Navy Bill for one who

Scarlett and Goulbourn for the plaintiffs.

The *Attorney General* and *Campbell* for the defendants.

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has no knowledge of the forgery, may recover back the money, as had and received to his use, upon failure of the consideration. And the principle is there laid down by *Gibbs* C. J. that the negotiator of a bill, by declining to indorse it, is not relieved from that responsibility which attaches on him for putting off an instrument as of a certain description, which turns out not to be such as he represents it. In the subsequent case of *Smith v. Mercer*, 6 Taunt. 76., it was held (*Chambre J. dissente*) that bankers who paid a forged acceptance of one of their customers, made payable at their house, could not recover the money from the *bonâ fide* holders of the bill, to whom the payment was made, on the principle that it was the duty of the bankers to have ascertained the authenticity of the order before they obeyed it; and because by taking up the bill they had deprived the holders of the remedy which they might have had against some prior parties on the bill. *Vide* also *Price v. Neale*, 3 Burr. 1354. 1 Bla. 390.

In the principal case it would seem, that the fact of the defendants' having paid over the money to *Simpson*, would, if proved, have made no difference, inasmuch as the payment to them must have been made on the credit of their possession, and negotiation of the bill. And the case is distinguished from that of *Smith v. Mercer*, by the circumstance of the plaintiffs' having paid the money on their own account, and not in obedience to the forged acceptance of their customer.

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GUILDHALL,
April 21, 1824.

SUTTON, Bart. v. The GOVERNOR and COMPANY of the BANK of ENGLAND.

The Governor and Company of the Bank of England having neglected and delayed to pass a warrant of attorney for the transfer of stock for an *unreasonable* time, are liable to answer in damages for the loss sustained in consequence of an intermediate fall of the funds.

THIS was an action on the case against the defendants for neglecting and refusing to pass a power of attorney executed by the plaintiff, for the transfer of stock standing in his name for an *unreasonable* length of time, whereby the plaintiff was injured and damaged in consequence of an intermediate fall of the funds.

In Oct. 1823, the plaintiff, who was possessed of 62,702*l.* 9*s.* 8*d.* 3 *per cent.* consols, was desirous of selling the same, for the purpose of purchasing an estate in *Norfolk*. A blank power of attorney was obtained from the Bank, and filled up and executed in the usual way, empowering a Mr. *Macdougall*, the solicitor of the plaintiff, to make the sale. On the 20th of *October* the broker employed by Mr. *Macdougall* lodged this power of attorney in the proper office at the Bank.

It appeared to be the usual custom to leave the warrant one day, for the examination of the inspector, and on the following day, if no objection is taken to it, it is passed into the transfer office. On the day the broker left the warrant of attorney at the Bank, he sold stock to the amount of 23,952*l.* 3*s.* 1*d.* to be delivered on the following day, the price being 83½*s.*

On the morning of the 21st, a little before twelve o'clock, he inquired at the transfer office whether the warrant had passed; and upon finding it had not, he went to the inspector's office, where it had

been originally deposited, and enquired the cause; and was informed by the inspector that he had no doubt it was correct, and would pass.

It was proved to be the usual custom of the Bank, upon sums under 20,000*l.* to have the warrants of attorney examined by the inspector only, and if he does not object, it passes to the transfer office; but that where the sum amounts to or exceeds 20,000*l.* it is the custom for warrants to be first examined by the inspector, and, if he has no objection, they then pass to the accountant-general, for further examination; but if the inspector objects, he stops them in the first instance. In the present case, the inspector had taken no objection to the warrant, but had passed it to the accountant-general.

Several applications were made by the broker and Mr. *Macdougall* in the course of that morning, (*viz.* the 21st,) both to the inspector and the accountant-general, to know whether the warrant had passed, but they were informed it had not; and upon one of these applications Mr. *Macdougall* desired to know the cause of the delay, but they refused to give him any information upon the subject.

Upon the last application made by Mr. *Macdougall*, he stated to the accountant-general the great inconvenience to which he was put, having engaged to attend in *Suffolk* on the following day, to pay some of the money to arise on the proposed sale of the stock, for an estate purchased by the plaintiff; and informed the accountant-general that he should hold the Bank responsible; and he again desired to know the reason of the delay, and the

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nature of the objection; upon this remonstrance he was informed, that the warrant of attorney was before the Governor of the Bank, and that the delay was owing to some apparent difference between the signature of this and a former warrant of attorney executed by plaintiff. Upon Mr. *Macdougall* knowing the nature of the objection, he offered to produce the bankers of the plaintiff, *Curtis and Co.*, and *Praed and Co.*, who would produce checks drawn by him, and authenticate the genuineness of the hand writing, and that he could also produce letters in his own possession from the plaintiff. He also offered to give the Bank any indemnity they might require, but these offers were rejected.

The plaintiff's broker, as he was not able to make the transfer, rebought the stock on the 21st, at the same price he had sold it on the preceding day.

It was proved that Mr. *Macdougall* had acted upon a former power from the plaintiff, under which stock to the amount of 200,000*l.* had been transferred, and that one of the attesting witnesses to the execution of that power was also an attesting witness to this second power of attorney. Mr. *Macdougall* had practised as an attorney in *London* for nearly forty years, and was well known to the solicitors of the Bank, whom he had seen in the course of the morning of the 21st upon this business, and with whom, it appeared, the Bank had previously consulted, as to the course which they should adopt with respect to this power of attorney.

The Bank having obtained the address of the plaintiff from Mr. *Macdougall*, wrote by the post

of that evening, to enquire whether the signature was authentic, and upon receiving a satisfactory answer from the plaintiff; on *Friday* the 24th, they passed the warrant to the transfer office.

The plaintiff's broker had called every day from the 20th to the 25th, between one and two o'clock in the day, to know whether the warrant had passed, and on the 25th was informed that it had. *Macdougall*, who had been obliged to attend his engagement in *Suffolk*, did not return to town until *Saturday*, and did not learn until *Monday* the 27th that the warrant had passed. The stock was sold on *Wednesday* the 29th, the first public day. The highest price both on *Monday* and *Wednesday* was 82½. This action was brought to recover the loss which the plaintiff had sustained by the difference in the price of stock, together with the amount of commission upon the first sale, amounting, on the whole, to the sum of 239*l.* 10*s.* 7*d.*

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ABBOTT Ld. C. J. This is an action against the Governor and Company of the Bank of *England*, for neglecting and refusing to pass a power of attorney for the transfer of stock. The Governor and Company, although one of the greatest mercantile communities in the world, are in no different situation from private individuals or private bankers, but are equally responsible for their acts.

It is not a question, in the present case, whether the Bank of *England*, where any reasonable doubt arises as to the authenticity of a warrant of attorney, may not take all reasonable means of clearing up that doubt, before they permit such a warrant to pass. But the points to be

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considered, as it appears to me, are, first, whether you think there was any *reasonable* cause of doubt; and, secondly, supposing there was a reasonable cause of doubt, did they take *proper* and *reasonable* means to have that doubt cleared up. If there was cause of doubt, and they did take reasonable means to investigate it, then they are clearly entitled to your verdict. But you will ask yourselves, whether it was not reasonable that they should have stated to Mr. *Macdougall* the nature of their objection, and have availed themselves of the means which he offered of clearing away their doubts. Can you consider it a fit and reasonable thing that they should refuse the explanation which he offered? especially when you bear in mind that he was well known to the solicitors of the Bank, and had passed a former warrant for this very plaintiff for the sum of 200,000*l.* The defendants, on the *Friday*, when the warrant was passed, ought to have informed Mr. *Macdougall*; they might either have written or sent, but this they neglect to do, and leave the party to wait his own time, and throw all the risk and responsibility upon him, although the delay was wholly for their own security. If you think there were no *reasonable* grounds for doubt, or if you think they did not take *reasonable* means for clearing up those doubts, you will find for the plaintiff.

Verdict for the plaintiff, damages 239*l.* 10*s.* 7*d.*

Scarlett and *J. L. Adolphus* for the plaintiff.

The *Attorney-General*, *Gurney*, and *Bosanquet* Serjt. for the defendants.

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M'GREGOR v. LOWE.

GUILDHALL,
April 22, 1824.*ASSUMPSIT*, money had and received.

The plaintiff, who had a scheme for establishing a colony on the coast of *Honduras*, in a district called *Poyais*, was desirous of raising a loan, and had employed the defendant as his agent for that purpose. The defendant had, accordingly, negotiated for this loan, and instalments had been paid to the defendant by various subscribers, to the amount of 30,000*l.*; part of this sum the defendant had paid over to the plaintiff. The subscribers being unwilling to proceed with the speculation, forfeited their deposits; and to recover the residue of the money remaining in the hands of the defendant, this action was brought. The defendant, upon receiving the deposits from the different subscribers, had issued scrip certificates, upon the face of which certificates it was stated that the loan was for the use of the *Poyais* state.

These certificates were produced by the plaintiff as part of the evidence of his case.

ABBOTT Ld. C. J. Is the plaintiff in a condition to prove the existence of such a state as *Poyais*, at the time these certificates issued? I am of opinion that, unless such a state is proved to have then existed, the parties to a mere bubble to deceive the public cannot be allowed to maintain an action against each other. I think such a transaction not fit to be inquired into in a court of justice. These certificates import an existing state

The defendant had been employed as the plaintiff's agent in raising a loan for establishing a colony on the coast of *Honduras*, and as such had received deposits from subscribers, and had given scrip certificates, on which it was stated that the loan was for the use of the *Poyais* state: Held that it was incumbent on the plaintiff to prove the existence of such a state, on the ground that the parties to a mere bubble to deceive the public could not maintain an action against each other.

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at the time they were issued, and it lies upon the plaintiff to establish that fact.

An attempt was then made to establish the existence of a state called *Poyais*, at the time of the issuing of the certificates; but the plaintiff failing to establish this, the Chief Justice directed the plaintiff to be nonsuited.

Denman C. S., F. Pollock, and R. V. Richards for the plaintiff.

The *Attorney General, Campbell, and Brougham* for the defendant.

GUILDHALL,
 April 24, 1824.

CURTEIS and another v. WILLES.

A person carrying on business at Warwick, came occasionally to London to make purchases for his trade, and while in London was frequently at the counting-house of C., with whom he dealt, and where other persons were in the habit of calling upon him: Held that desiring C. to deny him to a creditor, whom he expected to call, and concealing himself in C.'s house when the creditor called, was an act of bankruptcy.

ACTION against the sheriff for a false return to a writ of *fi. fa.*

The defence set up was an act of bankruptcy, previous to the issuing of the execution.

In order to establish this, the plaintiff gave in evidence the following facts: That the bankrupt, prior to his bankruptcy, carried on the business of a linen draper at *Warwick*; that he was in the habit of visiting *London* to make purchases for his trade; that, when in *London*, he was frequently at the counting house of a person of the name of *Corbett*, with whom he dealt for linen and other things to a considerable amount. While in town, persons were occasionally in the habit of calling upon him at *Corbett's* counting house. A person of the

name of *Johnson*, the petitioning creditor under the commission, resided near *Corbett's* house.

It was proved that, on a day prior to the issuing of the execution, the bankrupt, being at *Corbett's* counting house, desired him not to let *Johnson* know he was in town, as "he would plague him for money." *Corbett* informed the bankrupt "that he expected him to call that morning, and that he had better keep out of the way." Soon after this conversation the bankrupt, being informed that *Johnson* was entering the shop, in order to avoid seeing him, secreted himself in the cellar, where he remained until he was informed that *Johnson* had left the shop.

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The *Attorney General* contended that the defendant had failed in proving an act of bankruptcy; that the only ground on which this could be put as an act of bankruptcy was, "an absenting himself." None of the cases have extended further than a person absenting himself from his dwelling house; or from his ordinary place of business; or from a place where he had made an appointment with a particular creditor; or in order to avoid legal process. Here it was not his usual place of business, and he had no appointment with the particular creditor who called.

ABBOTT Ld. C. J. I am of opinion that the defendant has established a clear act of bankruptcy.

Nonsuit. (a)

(a) Vide *Bayly v. Schofield*, 1 M. & S. 338.

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CURTIS

v.

WILLES.

The *Attorney General* and *F. Pollock* for the plaintiffs.

Scarlett and *J. Evans* for the defendant.

In the following term the *Attorney General* moved to set aside the nonsuit. But the *Court* were of opinion, that it was "an absenting himself" within the meaning of the statutes, and refused the rule.

GUILDHALL,
April 24, 1824.

CAMBRIDGE v. ANDERSON.

Where a vessel has been driven on shore, and so damaged as to be unfit to proceed on her voyage without incurring an expence in repairs equal to her value: Held that the insured may recover for a total loss, although no notice of abandonment had been given to the underwriters.

ACTION on a policy of insurance upon a ship called "The Commerce,"

This vessel, of which the plaintiff was the owner, sailed on the 8th of *July*, 1823, from *Quebec* on her voyage to *Bristol*: having proceeded a considerable distance from *Quebec*, down the river *St. Lawrence*, she stranded on a shoal, and, in consequence of a heavy sea, was rendered totally unfit to proceed on her voyage. The captain, who was ignorant that his owners had insured, consulted with an agent of *Lloyd's* as to the course he should adopt, who advised a survey to be made. The surveyors, after having examined the ship, gave it as their opinion that she could *not* be repaired under a sum which would exceed the prime cost of the vessel. Upon receiving this estimate, the captain having floated the vessel back to *Quebec* sold her, with her register; no notice of abandonment had been given to

the underwriters. This action was brought to recover for a total loss, with benefit of salvage to the underwriter.

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The *Attorney General* contended that the plaintiff could only recover for an average loss; that the ship having remained in specie as a ship after the accident had happened, was capable of being repaired so as ultimately to have proceeded on her voyage, and if so it was the captain's duty to have her completely repaired. It cannot be considered as a total loss, unless she is incapable of repair.

ABBOTT Ld. C. J. This is a question of considerable importance to ship owners. If the jury are of opinion that this vessel could not be repaired at all, or that she could not be repaired without incurring an expense equal to or greater than her value, then I shall hold, that although she may exist in the form of a vessel, and be afterwards sold with her register, that the plaintiff will be entitled to recover as for a total loss with benefit of salvage to the underwriters; but if the vessel might have been repaired at something less than her total value, then I think the plaintiff can only recover for an average loss.

Verdict for the plaintiff.(a)

(a) See *Hodgson v. Blackeston*, Marshall on Insurance, p. 611. *Martin v. Crockatt*, 14 East, 465. *Alwood v. Henckell*, Park's Insurance, 280. *Reid v. Darby*, 10 East, 143. *Bell v. Nixon*, Holt's N.P.C. 423. *Idle v. Royal Exchange Assurance*, 8 Taunt. 755. S.C. 3., B. Moore, Rep. 115. *Read v. Bonham*, 3 Bro. & B. 147. *Robertson v. Clarke*, 1 Bing. 445.

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Scarlett, Marryatt, and Platt for the plaintiff.
The Attorney General and F. Pollock for the defendant.

In the following term the *Attorney General* moved for a new trial on two grounds:—First, That the plaintiff was only entitled to recover for an average and not a total loss, as the vessel might have been repaired so as ultimately to have proceeded on her voyage. Secondly, That the plaintiff had neglected to give a notice of abandonment to the underwriters.

The Court refused the rule.

SECOND ADJOURNED SITTINGS AT WESTMINSTER.

WESTMINSTER,
 May 3, 1824.

DOE ex d. SMITH v. CARTWRIGHT.

Entries in the land-tax collector's books stating A. B. to be rated for a particular house, and his payment of the sum rated, are admissible evidence to show that A. B. was in the occupation of the premises at the time mentioned.

IN order to prove that a house, part of the premises, for which this ejectment was brought, was, about the year 1770, in the occupation of one *Young*, the land-tax collector's book, produced by the clerk to the commissioners, was put in; and it was proposed by *Marryatt*, for the plaintiff, to read an entry, purporting to be made by the collector for that year, stating *Young* to be rated in the sum of 1*l.* 10*s.* for the house in question, and the payment by him of that sum. Other entries to the same effect were also offered.

Upon this evidence being objected to, *Marryatt*

referred to a case of right of way over some part of *Smithfield*, in which the Governors of *Christ's Hospital* were parties, when similar evidence had, after argument, been received by his Lordship.

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ABBOTT Ld. C. J., who at first doubted, upon the case referred to being brought to his recollection, said, that he thought the entry of the payment being made against the interest of the collector rendered the evidence admissible, to show the occupation, as the rating was clearly proved by the entry to that effect.

Verdict for the plaintiff.

Marryatt and *Chitty* for the plaintiff.

Curwood for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

HILARY TERM,

5 GEO. IV.

ADJOURNED SITTINGS AT WESTMINSTER.

WESTMINSTER,
Feb. 17, 1824.

HAWKINS *v.* HOWARD and another.

In an action against bankrupts, held that the solicitor to the assignees, who had been served by the plaintiff with a *subpoena duces tecum*, was bound to produce the books of the bankrupts, in order that entries, relating to the matters in issue, might be read.

ASSUMPSIT for negligently and carelessly lending the plaintiff's money on insufficient security.

The defendants, at the time of the contract, were annuity brokers, and had subsequently been made bankrupts. The solicitor to the assignees, who had been served by the plaintiff with a *subpoena duces tecum* to produce the books of the bankrupts, appeared with them accordingly, but objected to their being inspected, as likely to prejudice the estate of the assignees.

" " " " " "

Wilde, who was not in the cause, but attended on the part of the assignees for this particular purpose, supported the objection; and argued, that the case opened rendered the assignees liable to a demand, inasmuch as it asserted that the bankrupts had received money which they had misapplied; and if so, the count for money had and received would be supported, and the debt would be provable under the commission. That the assignees were entitled to the possession of the books, and ought to be protected.

It was answered, that the utmost prejudice to the assignees would be to render them liable to a civil demand; and the only exception to an obligation to produce was that of an attorney possessing the title deeds of his client, from which this case was totally different.

LORD GIFFORD. The assignees cannot be affected by this verdict, which ever way it may be. They are mere trustees for the creditors, and there is but a possibility of their being prejudiced. The plaintiff has a right to the production of the books, but the evidence must be confined to entries relating to the matters in issue.

Entries in the books were accordingly read, but the plaintiff was ultimately nonsuited.

Bosanquet and *Cross* Serjs., *Flannaghan* and *J. Evans* for the plaintiff.

Vaughan and *Pell* Serjs. and *Chitty* for the defendants.

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In *Pearson v. Fletcher*, 5 Esp. 91., *Corsen v. Dubois*, Holt's N.P.C., 239., *Cohen v. Templar*, 2 Star. 260., it was ruled that the solicitor to the assignees of a bankrupt, who has been served with a *subpœna duces tecum*, is bound to produce the proceedings under the commission. But see *Bateson v. Hartsink*, 4 Esp. 43., *Laing v. Barclay*, 3 Star. 42. *contra*.

ADJOURNED SITTING IN LONDON.

GUILDHALL,
 Feb. 25, 1824.

RICHARDSON v. MELLISH.

A copy of an official paper containing the number of passengers on board a vessel, made in pursuance of an act of parliament, by an officer of the customs, is admissible evidence to show the number and description of persons that were on board the vessel.

THIS was an action of *assumpsit* against the defendant for not performing a contract he had entered into with the plaintiff, to appoint him to the command of a ship called the *Minerva*, of which the defendant was the owner, and which had been chartered by the *East India Company* for a certain number of voyages to *China*.

The defendant, in order to show the damage he had sustained by not having been appointed to the *Minerva*, proposed to show the number of passengers that had sailed on board that vessel on one of the voyages, when, if the agreement had been fulfilled, he would have been entitled to the command.

For this purpose a clerk in the *India House* was called, who produced from the department to which he belonged a book containing, according to the statement of the witness, a copy of an official return of all the passengers who sailed on board the *Minerva* on the voyage in question, specifying, according to the provision of the 53 G. 3. c. 155.

s. 15(a), "their name, capacities, and descriptions." This copy of the official return had been transmitted by the officers of the custom to the secretary of the Court of Directors, pursuant to the provision of section 16(b) of the 53 G. 3. c. 155.

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Pell Serj. contended that this book could not be received in evidence to affect the plaintiff in this cause. As between the captain of the ship and

(a) "Provided also, and be it further enacted, That no ship or vessel, engaged in private trade under the authority of this act, shall be permitted to clear out from any port of the said United Kingdom, or any place or places under the government of His Majesty, or of the said company, situate more to the northward than eleven degrees of south latitude, and between the sixty-fourth and one hundred and fiftieth degrees of east longitude from *London*, until the master or other person, having the command of such ship or vessel, shall have made out, and exhibited to the principal officer of the customs or other person thereto authorised by such government as aforesaid, at such port of clearance, upon oath, (which oath such officer or other person is hereby authorised to administer), a true and perfect list in such form as shall, from time to time, be settled by the said court of directors, with the approbation of the said board of commissioners, specifying and setting forth the name, capacities, and descriptions of all persons embarked or intended to be embarked on board such ship or vessel, and all arms on board or intended to be put on board the same."

(b) "Provided also, and be it further enacted, That in every case where any such list shall be received in any part of the said United Kingdom from any master or other person, having the command of any such ship or vessel, the officer or other person receiving the same shall, and he is hereby required, with all reasonable despatch, to transmit a copy of such list to the secretary of the court of directors of the said United Company."

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 MELLISH.

the company, the book would clearly be evidence; but it could not be received against a third party, who knew nothing of its contents, and had no opportunity of checking it.

Lord GIFFORD. This section (16) of the act is framed with the express purpose of enabling the company to have a correct list of the passengers who may sail from this country. The book produced, is a document framed under that act of parliament; I think, therefore, that it is admissible. I do not call upon the other side to argue the question, being clearly of opinion that the evidence should be received.

Verdict for the plaintiff, 7500*l.* damages. (a)

Vaughan and *Bosanquet* Serjs. and *Campbell* for the plaintiff.

Pell and *Lawes* Serjs. and *Wilde* for the defendant.

(a) Vide *Johnson v. Ward*, 6 Esp. N. P. C., 47. Phillips on Evidence, 395. 6th edition:

A rule nisi for a new trial in this case has been granted on other grounds, and is now pending.

GUILDHALL,
 March 3, 1824.

GIBSON *v.* MINET and others.

A gives B. an order on his bankers, directing them

MONEY had and received.

The plaintiff kept an account with the defendant "to hold over from his private account 400*l.* to the disposal of B." The bankers accept the order. Held that such order was revocable, and might be countermanded before payment made to B., or appropriation to his credit.

ants, who were bankers in *London*, and on the 8th of *July*, 1822, there being at that time a balance of 542l. in his favour, delivered to *J. Mintern*, a partner in the house of *J. Mintern and Co.*, a letter directed to the defendants, of which the following is a copy :

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“ Gentlemen,

“ I request you to hold over 400l. from my private account, to the disposal of *J. Mintern and Co.*

“ *Wm. Gibson.*”

Upon this letter being delivered to the defendants, about the 13th of *July*, by *J. Mintern*, one of the defendants wrote in pencil, on the debit side of the plaintiff's account,

“ *N. B.* By *Mr. Gibson's* letter of the 8th of *July*, 1822, 400l. is to be held at the disposal of *Messrs. J. Mintern and Co.*”

On the 14th of *September*, 1822, the defendants sent the plaintiff his account, giving him credit for 542l. ; at the same time acknowledging the receipt of the order in favour of *Mintern and Co.*, but without debiting the plaintiff for the amount. The plaintiff having ascertained that the money was not paid out, wrote to the defendants countermanding the order, and stated that it had been given for a particular purpose, which had been satisfied. The defendants thereupon wrote to *Mintern and Co.*, requesting their direction, who ordered them to place the 400l. to their credit, at

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MINTERN.

the same time saying that "they should before that time have directed the above sum to be placed to their credit, but that they were willing the plaintiff should reap the benefit of the interest." The defendants then made the following entry in their books.

"*Wm. Gibson D^r to J. Mintern and Co.*

"For transferred, *per* order, in an old letter of the former, dated 8th of *July* last, now first desired to be acted upon by the latter. £400."

and in their ledger debited the plaintiff to that amount. The defendants then informed the plaintiff that they had transferred the money to *Mintern* and Co. These facts were proved by admissions. On the part of the defendants one witness stated, that upon *J. Mintern's* delivering the order to *Stride*, one of the defendants, he was asked whether he would have the money then, to which he answered, "No; that he wished it to be held at their disposal," and *Stride* assented.

- Lord GIFFORD left it to the jury to say, whether it was meant by the parties that the order should be conditional or absolute. If it was an absolute order, and accepted as such by the defendants, the plaintiff had no right to revoke it. If, on the other hand, it was executory, and they thought that it had not been acted on, the plaintiff had a right to revoke, and his countermand was in time.

Verdict for the plaintiff.

Vaughan Serj. and *Campbell* for the plaintiff.

Pell Serj. and *F. Pollock* for the defendant.

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MINET.

In the following term *Pell* Serjeant moved for a rule to show cause why the verdict should not be set aside and a new trial granted, and cited Lord *Ellenborough's* judgment in *Williams v. Everett*, 14 East, 597.

The Court refused the rule, and, on giving judgment,

BEST Ld. C. J. said, I perfectly accede to the case cited, but I see no pretence for disturbing this verdict. If the money had been actually transferred to the account and credit of *Mintern* and Co., the order would not have been revocable. But here there is no appropriation whatever. It was left at the disposal of *Mintern* and Co., and it has not been so disposed of. They have not dealt with the money until after the revocation. If any part of the money had been advanced, up to that advance the plaintiff would have been answerable, but no further. The account given by the witness is inconsistent with the letters.

An order on a wharfinger "to weigh and deliver goods" has been held to be revocable. *Vide supra*, p. 11. n., and cases there cited. In the case of *Lyte v. Peny*, Dyer, 49. a., it was held, that if a man bail money to another, *to the use of a third, and to be delivered on the day of marriage*, he may countermand it at any time before delivery over. And a case is there cited,

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in which it was ruled, that if *A.*, being in debt to *B.*, gives *C.* money to pay it, he might countermand the payment any time before actual payment. See also *Taylor v. Lendey*, 9 East. 49.

GUILDHALL,
March 3, 1824.

ARBOUIN and another, Assignees of PEYTON
a Bankrupt v. WILLIAMS and others.

A trader having goods lying in wharf, deposits blank delivery notes with a creditor to cover advances made, and becomes insolvent. The creditor, upon notice of the insolvency, fills up the blanks with his own name, and takes possession of the goods on the day before the trader commits an act of bankruptcy. In a trover by the assignees against the creditor: held that the goods so taken possession of were not within the 21 J. 1.

TROVER for divers quantities of rum, brandy, and pimento.

The defendants were bankers at *Chester*, and were in the habit of accommodating *Peyton*, with advances during his trading as a general merchant in *London*. The mode in which they were secured was this: *Peyton*, when in want of a loan, deposited with *Esdaile* and Co., the defendants' agents in *London*, a sealed packet marked with a particular letter, containing delivery orders on the dock companies and wharfingers, in whose custody he at the time had goods lying. These orders were signed by *Peyton*, directing the persons to whom they were addressed, to transfer or deliver to [blank] or bearer the goods specified in them; but varied in form according to the nature of the goods to be delivered, and the companies or wharfingers to whom they were directed. The deposit of these packets was, from time to time, made through the intervention of *White*, a broker, *Peyton's* connection.


c. 19. s. 11. Held also, that goods lying in the bankrupt's name on any part of the day of the bankruptcy were within the statute.

Held also, that goods of the bankrupt lying in wharf in the names of his agents, and for which he had given delivery orders in his own name, were not within the statute, there being no reputed ownership.

tion with the transactions being all along concealed from the knowledge of *Esdaile* and Co. Having made the deposit, *Peyton* acquainted the defendants, and sent them his promissory note for the amount required, and received a letter of credit in favour of *White*, on *Esdaile* and Co., and through his agency procured the money. These packets were never examined or opened by *Esdaile* and Co., but were held by them as securities to cover the advances made for the defendants to *White*. Upon *Peyton's* requiring any of the orders deposited, with a view to get the goods from the wharfs for the purposes of his trade, other sealed and marked packets, containing fresh orders, were substituted, *Esdaile* and Co. having authority from the defendants to make the exchange.

Upon the 28th of *June*, 1822, *Peyton's* affairs having become desperate, he resolved to stop payment; this resolution was communicated to his creditors, and his insolvency was generally known from that day, and on the 4th of *July* following he committed an act of bankruptcy. On, or soon after the 28th of *June*, *Peyton* informed *Esdaile* and Co. of the contents of the packets in their hands, and of the purpose for which they were deposited. *Esdaile* and Co. without communicating with the defendants, for which there was not sufficient time, broke open the packets and filled up the blanks in the orders with the defendants' names, and had them delivered at the different docks and wharfs, and took possession of the goods.

The greater part of the goods stood at the docks and wharfs in the name of *Peyton*, but some of them were in the names of his agents. It was doubtful on

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 v.
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 }
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the evidence whether some part of those in *Peyton's* name had not been delivered or transferred to the defendants, on or after the 4th. Those standing in the names of his agents were delivered afterwards, the wharfingers refusing to deliver them to any orders but those of the persons in whose names they stood, and who gave delivery orders in favour of the defendants, at *Peyton's* request, after the 4th of *July*. No dishonesty or fraud was imputed to *Peyton* in the whole of these transactions, unless the giving notice to *Esdaile* and Co. upon his insolvency were so considered in law, as tending to defeat the policy of the bankruptcy statutes.

The action was brought to recover the value of the goods so taken possession of by *Esdaile* and Co. for the defendants, the value being nearly 20,000*l.* to which amount *Peyton* was in defendants' debt, and the question was, whether all or any part of these goods were in the "possession, order, disposition, and reputed ownership of the bankrupt" within the meaning of the statute 21 *J. 1. c. 19. s. 11.*

Lord GIFFORD in summing up, told the jury, that as to those goods standing in *Peyton's* name, which were actually transferred to the defendants' names in the dock and wharf books on the 3rd, he was of opinion; if there was no fraud, for which there seemed to be no pretence, that the bankrupt could not be said to have the order and disposition within the statute, and that as to them, the verdict must be for the defendants. 2ndly. As to those transferred on the 4th, if there were any, he was clearly of opinion; that if there were any at all standing in the bankrupt's name on that day they would fall

within the statute, though it was not shown whether they were transferred before or after the act of bankruptcy. 3rdly. As to those that stood in the names of agents for the bankrupt, and had never been in his, he left it to the jury to say whether they could be said to be in the reputed ownership of the bankrupt; it was quite clear that they were in his order and disposition, because he had actually transferred them afterwards, but whether he had any reputation from them, his name not being mentioned in the books, was for them to say.

Verdict for the defendants.

Vaughan and *Taddy* Serjs., and *Claridge* for the plaintiffs.

Bosanquet Serj., *Tancred*, *Campbell*, and *F. Pollock*, for the defendants.

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ABROUIN
v.
WILLIAMS.

ROBERTSON v. MONEY.

GUILDHALL,
March 4, 1824.

THIS was an action on a Policy of Insurance on the freight of the ship *Neptune*, "at and from the termination of her outward voyage, at *New South Wales*, and *Van Dieman's Land*, to her port or ports of discharge and loading in *India and the East India Islands*, during her stay and loading there, and from thence to her port or ports of discharge in *Europe*."

The loss claimed was upon the freight of a

cantile contracts as an *East India Island*, although treated by geographers as an African Island.

In an action on a policy of insurance on a voyage "at or from the port or ports of discharge and loading in India, and the *East India Islands*," evidence admitted to prove that the *Mauritius* is considered in mer-

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cargo loaded at the *Mauritius*; and in order to show that the *Mauritius* was an *East India Island*, within the meaning of the policy, it was proposed on the part of the Plaintiff to give in evidence the opinion of merchants and others, as to the *Mauritius* being generally so considered in mercantile contracts, and in insurances. The case of *Uhde v. Walters*, 3 Camp. 16. was relied on.

This was objected to, on the ground that it ought not to be permitted, to give evidence of a usage by any class of men, to employ a term in a sense different from its ordinary and proper acceptance. *India* and the *East India Islands*, it was contended, are terms of known and settled import, and although it might be admissible to show that the *Mauritius* was in *India*, or was an *East India Island*, it does not follow that the evidence is admissible to show that these terms are used by merchants in a sense different from that in which they are usually understood.

Lord GIFFORD said, that upon the authority of the case cited, he thought the evidence admissible.

Several eminent *East India* merchants, and others conversant with underwriting, were then called, who stated that the *Mauritius* was considered amongst merchants an *East India Island*, and that losses were usually paid on that principle.

On the part of the defendant, it was proved to be, geographically, an *African Island*, and so reputed amongst geographers, and amongst the inhabitants of the Island, and that it was totally unconnected with the *East India Company's* Government.

Lord GIFFORD left it to the jury, upon the whole evidence, to say whether the *Mauritius* was an *East India Island* within the meaning of the policy.

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ROBERTSON
v.
MONEY.

Verdict for the plaintiff.

Pell Serj., *Campbell*, and *Wilde*, for the plaintiff.
Vaughan and *Taddy* Serjs., and *Maule* for the defendant.

Vide *Robertson v. Clarke*, 1 Bing. 445.

LENT ASSIZES, 5 GEO. IV.

WESTERN CIRCUIT.—LAUNCESTON.

Coram BOSANQUET, Serjeant.

EDMONDS Administrator, &c. v. ROWE.

March 29,
1824.

IN this case a witness was called, who, on the book being put into his hand to be sworn, refused to swear on the New Testament. He stated himself to be a Christian, and a member of the society of methodists, and that he believed both the Old and New Testament to be the word of God; but as the New Testament prohibited swearing, and the Old countenanced it, he wished to be sworn on the Old, or on any part of it not apocryphal, and such oath he should consider binding on his conscience.

A witness who declines swearing on the New Testament although he professes Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience.

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 EDMONDS
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Pell, Serjeant, objected to his swearing otherwise than on the New Testament, the truth of which he professed to believe.

Bosanquet Serj. said, that as the witness had scruples in swearing in that form, he ought to be allowed to use that mode which he considered binding on his conscience.

He was accordingly sworn on the Old Testament.

Adam and *Carter* for the plaintiff.

Pell Serj. and *Wilde* for the defendant.

BRISTOL GAOL DELIVERY.

Coram LORD GIFFORD, Recorder.

April 20, 1824.

REX v. GEORGE HALTON.

A prisoner upon being arraigned stated that he was deaf, and when the indictment was read over to him, apparently did not hear; the judge directed a jury to be empanelled to try whether he stood mute by the act of God, or out of malice.

THE prisoner was indicted on 43 G. 3. c. 58. for maliciously cutting the prosecutor with a knife.

When called upon to plead on his arraignment, he said that he was quite deaf, but that he could read print or large writing. An officer was then directed to read over the indictment close to him with a loud voice, but the prisoner did not appear to hear; and on his not answering, a jury was sworn to try whether he stood mute by the act of God, or out of malice. (a)

(a) *Vide* the form of the oath, C. C. Comp., p. 542., 9th edit.

The gaoler was then examined, who said, that the prisoner had always appeared quite deaf during the several months that he had been in his custody, and that his fellow-prisoners conversed with him by signs.

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Rex.
v.
GEORGE HAL-
TON.

Lord GIFFORD Recorder, in charging the jury, said, that he had adopted this mode of proceeding after great deliberation upon the authority of two cases, (*Rex v. Jones* and *Rex v. Steele*,) (*a*) which occurred many years ago at the *Old Bailey*, and which, in his opinion, governed the present case in principle, though they differed from it in several respects.

The jury found that the prisoner was mute by the act of God, and they were then sworn to try him upon the indictment.

The evidence of each witness was taken down in a large hand, and shown to the prisoner before the witness retired. The prisoner read it, and asked some questions about words in the writing which he could not make out; but did not cross-examine the witnesses.

The jury acquitted him.

(a) Leach, 451. *Idem*, 452. n. 6.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS IN AND AFTER

EASTER TERM,

5 GEO. IV. 1824.

FIRST SITTINGS IN TERM AT GUILDHALL.

*Saturday,
May 8, 1824.*

SMITH v. MAXWELL.

A marriage in Ireland performed by a clergyman of the Church of England in a private house, held valid, although no evidence was given that any license had been granted to the parties.

ACTION on a bill of exchange, the defence was coverture.

It was proved that the defendant was married at her father's house in *Ireland*, in the year 1799, in the presence of the friends of both families. The ceremony was performed by a clergyman of the church of *England*, who was then, and had been for a long time previous, curate of the parish. The parish church was at that time standing, but persons of respectability were usually married at their own houses. The parties lived together for

several years following as man and wife. On its being objected that this marriage was not valid without the production of a special licence,

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v.
MAXWELL.

BEST C. J. said, I know of no law which says that celebration in a church is essential to the validity of a marriage performed in *Ireland*. The *English* marriage act does not apply, and I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that act ; and which, as it is said in the case of *Dabrymple v. Dabrymple* (a), are common to the greater part of Europe. That case has placed it beyond a doubt that a marriage so celebrated, as this has been, would have been held valid in this country, before the existence of that statute : and when I find that this marriage was performed by a gentleman who had officiated as curate of the parish for eighteen years, I must presume it to have been correctly performed according to the laws of that country, and I shall not put the defendant to the production of a licence, or to any further proof. It is true, that in a case for bigamy tried before Mr. Justice *Bayley*, on the northern circuit, an acquittal was directed because the first marriage, which took place in *Ireland*, was performed in a private house : but I have reason to know that that learned judge altered his opinion afterwards, and was satisfied of the validity of the first marriage. The plaintiff must be called.

Nonsuit.

(a) 2 *Haggard*, 54.

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 v.
 MAXWELL.

Vaughan and Taddy Serjeants and Rowe for the plaintiff.

Pell, Serjeant, for the defendant.

We have been favoured, by a gentleman of the bar, with the following note of the case to which his Lordship alluded.

Charlotte Reilly was tried at the *Lancaster Summer Assizes*, 1823, for bigamy. Her first marriage was solemnized in *Ireland*, under a license from the Archbishop of *Dublin*, authorizing the clergyman, to whom it was directed, to marry the parties, *at the usual canonical time and place*. The ceremony was performed by the curate of the clergyman, to whom the licence was directed, in a private house, and after the canonical hour. The learned judge, who presided, after consulting with Mr. Justice *Holroyd*, thought that the non-compliance with the licence, in respect of the place in which the ceremony was performed, rendered the marriage void, and directed an acquittal.

See this case stated in *Burn's Ecclesiastical Law*, 8th edition, p. 490. (note 7.)

See the case of *Latour v. Teesdale*, 8 Taunt. 890. where a marriage between two *British Protestant* subjects, solemnized by a *Roman Catholic* priest at *Madras*, according to the rites of the catholic church, but without the licence of the governor, which it had uniformly been the custom to obtain, followed by cohabitation, was held valid. In 1 Roll. Abr. tit. *Baron and Feme*, 341. pl. 21. it is laid down, that "If a man and woman be married by a priest in a place which is not a church or chapel, and without any form of the celebration of mass still it is a good marriage, and they are man and wife." See *Burn's Ecclesiastical Law*, vol. 2. p. 422. It would seem, that in *England*, before the stat. 26 G. 2. c. 33. an irregular celebration of marriage by a priest was mere matter of ecclesiastical discipline; but in courts of law irregular marriages were perfectly valid.

1824.

FOURTH SITTING IN EASTER TERM.

EVANS *v.* SWEET.GUILDHALL,
May 29, 1824.

TRESPASS. Assault, battery, and false imprisonment, stated to have been committed in concert and contrivance with *Timothy Young*. Not guilty, and a justification that *Timothy Young* was bail for the plaintiff in a certain action, and that *Young* and the defendant in his aid took the plaintiff and imprisoned him, in order to his surrender as by law, &c.

Replication, that the bail bond was taken fraudulently, and issue thereon.

The defendant was keeper of a lock-up house, to which *Young*, who had taken the plaintiff in in order to his surrender, brought him; and *Young* and the defendant kept him there imprisoned. The defendant acted under the directions of *Young*, and refused to take any step in the transaction without his orders.

It was proved that a written paper had been delivered to *Young*, in the defendant's house, by the plaintiff's attorney, whilst the plaintiff was in the defendant's custody, and whilst a negotiation for his release was going on, but it was not traced further.

A notice to produce had been served on the defendant, and upon refusal by the defendant's counsel to produce,

In an action of trespass, notice having been given to the defendant to produce a written paper which had been delivered to A.B., under whom defendant justified, and under whose directions he acted; held that the plaintiff was not entitled to give secondary evidence of the contents.

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EVANS

v.

SWEET.

Cross Serjeant proposed to give in evidence a copy of the paper, which was objected to.

BEST C. J. I think you have not done enough to justify giving secondary evidence of this paper. If you had left it with a servant of the defendant's, at his dwelling house, it might have done; but you merely trace it into the hands of a person acting in an independent character.

Nonsuit.

Cross Serj. and *Thessiger* for the plaintiff.

Pell and *Wilde* Serjs. and *Wightman* for the defendant.

See *Baldney v. Ritchie*, 1 Starkie, 338.

SITTINGS AFTER TERM AT WESTMINSTER.

WESTMINSTER,
June 1, 1824.

SPOONER v. GARDINER.

Where the drawer of a bill of exchange had no effects in the hands of the acceptor from the time of drawing the bill, till it became due, but the ac-

ACTION by indorsee against drawer of a bill of exchange.

No notice of the dishonour of the bill by the acceptor had been given to the defendant.

The acceptor, Lord *Oxford*, had been introduced to the defendant for the purpose of borrowing money, and had received his acceptances to a

ceptor had received from the drawer, prior to this bill on which the action was brought, acceptances of the drawer, upon which he had raised money, some of which acceptances had been returned dishonoured, and others were outstanding: Held, that the drawer was entitled to notice of dishonour of the bill.

large amount. Some of these Lord *Oxford* had negotiated, and had been obliged to take up on their becoming due. At the time the bill in question was accepted, two of the defendant's acceptances, to a much larger amount than the bill in question, which Lord *Oxford* had negotiated and raised money upon, were outstanding, but no money passed in consideration of his acceptance of the bill in question.

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SPOONER
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GARDINER.

It was insisted by the counsel for the plaintiff, that the acceptances having been given for the accommodation of the drawer, no notice of the dishonour was necessary.

BEST C. J. I am strongly of opinion, that this is not a case in which the plaintiff is relieved from the necessity of proving a notice of the dishonour. The principle upon which notice is dispensed with is, that a fraud has been committed in drawing on a person with whom the drawer had no effects; and on whom he had no right to draw. That is not so here. The defendant was at the time liable on acceptances given to Lord *Oxford*, and on which the latter had raised money, and he had a right to draw on him to a greater extent than this bill. I have looked into the case of *Clegg v. Cotton (a)*, and the principle is so stated in that case. I have a clear opinion on this subject, but I will allow the cause to proceed, and give the defendant leave to move to enter a nonsuit.

(a) 3 B. & P. 239., and see the cases on this subject in *Bayley* on Bills, 5th Edit. 234.

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SPOONER

v.

GARDINER.

When notice of intention to dispute the consideration of a bill or note has been given, and the plaintiff's witnesses have been cross-examined to that point, the plaintiff must give such evidence as he has to offer in proof of the consideration in the first instance, and will not be allowed to do so in reply.

In this case notice had been given by the defendant, that the consideration of the bill would be disputed. Evidence was given by the defendants to show that the plaintiff was not a *bonâ fide* holder of the bill; and upon the plaintiff's counsel proceeding to call witnesses in support of the plaintiff's title,

BEST C. J. said, I wish it to be understood, as the rule I shall always act upon in future, that where notice has been given of intention to dispute the consideration of a bill or note, and the plaintiff's counsel is apprised by the cross-examination that the consideration is disputed, he must give his evidence in support of the bill in the first instance. It is by far the most convenient mode, that when the consideration is to be gone into, it should be done at first; and I will not after this allow such evidence to be given in reply.

Verdict for the defendant (a).

Lawes Serjt., for the plaintiff.

Vaughan Serjt. and *Dowling*, for the defendant.

(a) In *Delauney v. Mitchell*, 1 Starkie, 439. Lord *Ellenborough* ruled, that after notice had been given that want of consideration would be insisted on as a ground of defence, it was not competent to the plaintiff to give evidence of the consideration in reply to the defendant's case. But the rule acted upon by the present Lord Chief Justice of the King's Bench, is said to be, that unless suspicion is raised on the plaintiff's case, he may be permitted to give such evidence in reply, even after notice. See *Phillips on Evidence*, 6th Edit. Vol. ii. p. 17. *Chitty on Bills*, 6th Edit. p. 401.

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ADJOURNED SITTINGS AT WESTMINSTER.

DOE *ex d.* SCALES *v.* BRAGG.WESTMINSTER,
June 4, 1824.

THIS was an ejectment.

On the part of the plaintiff a witness was called, who, on his examination on the *voir dire*, stated, that the lessor of the plaintiff had, about twenty-four years ago, assigned the premises to him, for the purpose of protecting him against being pressed as a sailor; that he had kept the deed for several years, as long as it was wanted for the protection, and then gave it back to the lessor of the plaintiff; and that he had never seen the deed since; that he did not believe that he had now any beneficial interest in the premises, or that he had ever had.

A witness on the *voir dire* stated that the lessor of the plaintiff had formerly assigned to him the premises in question for a temporary purpose, that he had given up the deed to lessor of the plaintiff, and had never had any possession of the premises: Held that the witness was incompetent by reason of interest.

It was objected and argued by the counsel for defendant, that the witness had a direct interest in supporting the plaintiff's action, because if the plaintiff were in possession of the premises, the witness would have a perfect title against the plaintiff, who would be estopped from denying the right conveyed by his own deed; and this right had never been reconveyed to the plaintiff.

BEST C. J. I think this witness has such an interest as renders him incompetent, and that for the reason given. The recovery of the plaintiff in.

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DOE *ex d.*
SCALES
v.
BRAGG.

this action would perfect that title, which he has conveyed to the witness, and which, in an ejectment brought against him, this plaintiff would be estopped from denying. The witness is mistaken in imagining he has no interest. He has an interest, though he believes otherwise, and that renders him incompetent.

The cause was referred.

Pell Serjt. and *Erskine* for the plaintiff.

Vaughan and *Wylde* Serjts. for the defendant.

WESTMINSTER,
June 11, 1824.

DOE *ex d.* BULKELEY v. WILFORD.

A fine was levied of twelve messuages in Chelsea. It was proved that the cognizor had more than twelve messuages in Chelsea. Held that parol evidence was admissible to show which messuages the cognizor intended to pass by the fine.

THIS was an ejectment brought by the heir-at-law, to recover certain premises in *Chelsea*.

The ancestor, *J. Wilford*, had by will devised all his real estates to the defendant; but subsequently to the date of the will had levied a fine of certain property in *Chelsea*. No uses were declared of the fine, and the ejectment was brought for the property comprehended in it, the will being revoked *pro tanto*.

The fine was for "twenty acres of arable land, twenty acres of pasture, and twelve messuages, in *Chelsea*."

It was proved that at the time of levying the fine, *J. Wilford* was seised of seventeen messuages in *Chelsea*; and in order to explain what messuages were intended to pass by the fine, it was proposed to put in evidence an agreement between *J. Wilford*

and the Governors of *Chelsea* Hospital, for the sale of certain lands in *Chelsea* to the Hospital, in which it was stipulated that *Wilford* should levy a fine of a part of the lands called the *Ranelagh* estate, the title to that estate being doubtful. This was objected to.

1824.
 }
 Doe ex d.
 BULKLEY
 v.
 WILFORD.

BEST C. J. I think that in this case parol evidence is clearly admissible, in order to explain what messuages it was intended should be conveyed by the fine; and upon this principle, that a latent ambiguity in the fine has been shown to exist by extrinsic evidence. If the ambiguity had been apparent on the face of the fine, such evidence would not have been receivable; but it having been proved that there were at the time the fine was levied seventeen messuages, any of which might have passed under it, and it being impossible to ascertain which twelve were meant but by similar evidence, I think this agreement must be received for that purpose, on the same principle that a verbal declaration is always admissible to explain a latent ambiguity. There is an authority in which it is said, that in an ambiguity of this description, the cognizee may choose which estate he will take; but to that doctrine I cannot subscribe.

It was afterwards shown that there were twelve messuages on the *Ranelagh* estate, and the plaintiff had a verdict for the whole of that estate, and no more. (a)

(a) Where a fine and recovery is of so many acres as D., the parties interested shall have their election in what part of the

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 DOR' ex d.
 BULKLEY
 v.
 WILFORD.

Onslow and Pell Serjts. and Reader for the plaintiff.

Bosanquet and Taddy Serjts. for the defendant.

estate it shall operate. MS. Rep. said to be Lord *Harcourt's*. 13 Vin. Abr. 275.

But see *Edward Allham's* case, 8 Co. 90., where it is said, that "If a man levies a fine of the manor of *Soure*, or of the manor of *Dirtleby*, and in truth there is the manor of *North Soure*, and *South Soure*, or *Great Dirtleby*, and *Little Dirtleby*, in this case issue may be taken *dehors* which manor the cognizor intended to pass, for that is matter of fact not apparent in the fine, whereof the judge cannot take cognizance; but it stands well with the fine, and shall be tried by the jury."

The same principle is recognised in the Lord *Cheyney's* case, 5 Co. 68. b. See Vin. Abr. 244.

If I have two manors of *D.*, and I levy a fine of the manor of *D.*, circumstances may be given in evidence to prove what manor I intended, as appears in 12 H. 7. *per Montague* Ch. J. Pl. Com. 85, in the case of *Partridge v. Strange*.



ADJOURNED SITTINGS IN LONDON.

GUILDHALL,
 June 16, 1824.

HARRINGTON v. FRY.

A witness who had never seen the defendant, but had corresponded with a person of the defendant's name, living at Plymouth Dock, where the defendant resided, and where, according to other evidence, there was no other person of that name, stated that the hand-writing of certain letters was that of the person with whom he had corresponded. Held that this evidence was sufficient to admit the letters to be read against the defendant.

It was proposed to give in evidence certain letters as of the hand-writing of the defendant. The

name, living at Plymouth Dock, where the defendant resided, and where, according to other evidence, there was no other person of that name, stated that the hand-writing of certain letters was that of the person with whom he had corresponded. Held that this evidence was sufficient to admit the letters to be read against the defendant.

witness who proved the hand-writing, stated that he had never seen the defendant, but had corresponded with a *Samuel Fry of Plymouth Dock*; that he had so addressed his letters, and had received answers from him; that it was from these letters that he derived his knowledge of the hand-writing. Another witness stated that the defendant, *Samuel Fry*, ship owner, lived at *Plymouth Dock*, and that there was no other person of that name living at *Plymouth Dock* within his knowledge.

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It was objected by the counsel for the defendant, that there being no proof of the defendant having recognised the letters from which the witness drew his knowledge of the defendant's hand-writing, the letters could not be read, inasmuch as there might be another person than the defendant of that name living at *Plymouth Dock*; and that notice should have been given to the defendant to produce the letters directed to *Samuel Fry* of which the witness spoke, before it could be assumed that the answers were his hand-writing.

BEST C. J. I am of opinion that enough has been shown to make these letters admissible before the jury as of the hand-writing of the defendant. The knowledge which the witness has of the defendant's hand-writing, is drawn from a correspondence with a person of the defendant's name at *Plymouth Dock*; and it is shown by a person having competent knowledge on the subject, that there is no other person of that name living there. This is, at least, evidence for the jury to consider whether the letters alluded to by the witness were not written by the defendant. What was the sub-

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ject of that correspondence is perfectly immaterial, and no notice to produce is necessary, the letters being used by the witness to form his opinion of *Samuel Fry's* hand-writing, and for no other purpose.

Vaughan Serj. and *E. Lawes* for the plaintiff.

Pell and *Wylde* Serjts., and *Bayley* for the defendant.

Nonsuit, with leave given to the plaintiff to move to enter a verdict for a certain sum.

Upon motion made by *Vaughan* Serj., in the following term, to set aside the nonsuit, the Chief Justice enquired of *Pell* Serj., whether in case the rule were granted, any objection would be made to the reception of the letters; when the learned Serjeant said he should certainly waive any further objection on that head.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

IN AND AFTER

EASTER TERM,

5 GEO. IV. 1824.

LAST SITTINGS IN TERM AT WESTMINSTER.

BAKER, Assignee of the Sheriff of Middlesex v. WESTMINSTER,
May 17, 1824.
NEWBEGIN.

THIS was an action on a bail bond. Plea: *non est factum*.

The condition of the bond as stated in the record was "that if the said defendant, *William Newbegin*, should appear before our said lord the king at *Westminster*, on *Friday*, next after fifteen

In an action on a bail bond. The condition set out in the record was "to answer the said plaintiff in a plea of trespass, and also to a plea to be exhibited

against said defendant for 60*l.* upon promises." The bond, when produced, did not contain the words "*upon promises*:" variance held fatal.

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days of *St. Martin*, to answer said plaintiff in a plea of trespass, and also to a bill of said plaintiff, to be exhibited against said defendant, *William Newbegin*, for 60*l.* upon promises, according to the custom of the court of our said lord the king, &c., then the said obligation should be void," &c.

Upon the bond being produced, and read in evidence, it appeared that the condition was in all respects the same as that set out in the record, except that it did not contain the words "*upon promises.*"

ABBOTT Ld. C. J. was of opinion that this was a fatal variance.

Nonsuit.

J. Lockhart for the plaintiff.

The cause was undefended.

ADJOURNED SITTINGS AT WESTMINSTER.

WESTMINSTER,
 June 5, 1824.

REX v. HAILEY.

A party may be indicted for perjury in an affidavit, which cannot, from certain omissions in the jurat, be received in the court for which it is sworn, the perjury being held complete at the time of swearing

THIS was an indictment for perjury, alleged to have been committed by the defendant in certain affidavits, filed in the office of the secretary of bankrupts, and relating to the service of a petition upon one *Thomas Sivester*, a bankrupt.

A clerk from the office of the secretary of bankrupts produced one of the affidavits upon which perjury had been assigned, the jurat of which was as follows. —

" Sworn before me this ninth day of *July*,
eighteen hundred and twenty-three.

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v.

HAILEY.

" The mark of

" *James Trower.*"

✕

Mary Hailey.

Andrews, as counsel for the defendant, objected to this affidavit being read : — First. Because the jurat omitted to state where the affidavit was sworn : Secondly, That there was no memorandum, that it was made by a person who could not write : Thirdly, That it did not state that the contents had been read over to the deponent before she made her mark.

It was proved by *Mr. Trower*, a master in Chancery, and by *Mr. Smith*, a clerk in the public office of the court of Chancery, that where the person making an affidavit is unable to write, the jurat is in the following form : —

" Sworn at the public office, *Southampton Buildings* the 30th day of *July*, 1823 ; the witness to the mark of the deponent, *Mary Hailey*, being first sworn that he had truly, distinctly, and audibly read over the contents of this affidavit to the said deponent, and that he saw her make her mark thereto.

" The mark of

" Before *James Trower.*"

✕

Mary Hailey.

" Witness *Thomas Silvester.*"

These witnesses also stated that no affidavit would be received (if known) that did not contain

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 {
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this form of jurat when the party could not write. (a)

Taunton and *Russell* submitted, that although the court of Chancery may not permit an affidavit to be read, if there are not certain statements in the jurat, still perjury may be assigned upon it. A person is equally guilty of perjury although he may have omitted to comply with all the rules and orders of the court, which are merely directory. In many cases of forgery, although the instrument forged is not a valid or available instrument in law, from some defect, such as the omission of a stamp, &c., still the party may be convicted of forgery. (b) In the present case the affidavit has been actually used before the Chancellor in the matter there depending, and is filed with the proper officer, by whom it is now produced.

Littledale J. If the counsel for the prosecution

(a) "The masters in taking affidavits and administering of oaths in cases duly presented unto them, are to be circumspect and wary, that the same be reverently and knowingly given and taken, and are therefore to administer the same themselves to the party, and where they discern him rash or ignorant, to give him some conscionable admonition of his duty, and be sure he understand the matter contained in his affidavit, and read the same over, or hear it read in his presence and subscribe his name or mark thereunto before the same be certified by the master, who is not to receive or certify any affidavit unless the same be fairly and legibly written, without blotting or interlineation of any word of substance." *Beame's Orders in Chancery*, 209. Vide also *Turner's Practice in Chancery*, title *Affidavits*: and 1 *Newland's Practice in Chancery*, 164.

(b) *Rex v. Hawkeswood, Pasch. 1783. 1 Leach, 257.*

are prepared to prove that this affidavit was distinctly read over to the defendant at the time she was sworn to the truth of its contents, and that the oath was administered to her in the county of *Middlesex*, I am of opinion that the affidavit may be read. The omission of the form directed by this and other courts to be inserted in the jurats of affidavits may be an objection to their being received in the court whose rules and regulations the party has neglected to comply with; but I am of opinion that the perjury is complete at the time the affidavit is sworn, and although it cannot be used in the court for which it is prepared, that, nevertheless, perjury may be assigned upon it.

It was then proved on the part of the prosecution that the affidavit was sworn in the county of *Middlesex*, but that at the time the defendant was sworn before the master in Chancery the contents were not read over to her.

Defendant was acquitted.

Taunton and *W. O. Russell* for the prosecution.

Andrews and *Adolphus* for the defendant.

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v.

HAILLY:

REX v. SPENCER.

WESTMINSTER
June 9, 1824.

THIS was an indictment for perjury alleged to have been committed in an answer to a bill filed against the defendant in the court of Chancery.

In an indictment for perjury in an answer to a bill in Chancery:

recital in the jurat of the place where the answer purports to be sworn, is sufficient proof that the oath was administered at the place named.

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 {
 Rex
 v.
 SPENCER.

The defendant's signature to the answer, and that of the master in Chancery to the jurat, having been proved, and it having been also proved that *Southampton Buildings*, which the jurat recited as the place where the oath was administered, was in the county of *Middlesex*, the prosecutor's counsel proposed to read the answer.

Gurney objected, that there was no evidence independent of the mere recital in the jurat, that the answer was sworn to by the defendant at the place therein named.

ABBOTT Ld. C.J. I shall permit the answer to be read. The recital of the place where the oath is administered in the jurat, has always been considered, in cases of this kind, as a sufficient proof that the oath was administered at the place named. (a)

The indictment, purporting to set out the substance and effect of the bill, stated an agreement between the prosecutor and defendant respecting *houses*. Upon the bill being read, the word *house* was in the singular number: variance held fatal.

The indictment, in setting out the *substance* and *effect* of the bill in equity, to which the defendant had put in an answer, and upon which the perjury was assigned, stated an agreement between the prosecutor and the defendant respecting *houses*. Upon the original bill being read, it appeared that the word *house* was in the singular number.

Gurney contended that this was a fatal variance, and cited the case of *Hoar v. Mill*, 4 M. & S. 470.

(a) See *Rex v. Benson*, 2 Campb. 508.

ABBOTT Ld. C. J. The indictment professes to describe the substance and effect of the bill ; it does not, certainly, profess to set out the tenor ; but this I think is a difference in substance, and consequently a fatal variance.

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 v.
 SPENCER.

Defendant was acquitted.

Scarlett and Hutchinson for prosecution.

Gurney and E. Lawes for the defendant.

PAIN and another v. **WHITTAKER** and another, Sheriff of Middlesex.

WESTMINSTER,
 June 9, 1824.

TROVER for a pianoforte.

A person of the name of *Evans*, on the 2d of *February*, 1824, hired of the plaintiffs, who were instrument makers, the pianoforte, for which this action was brought, at a guinea and a half *per* month. On the 13th of *February* the piano was seized by the defendants as sheriff of *Middlesex*, under a writ of *fi. fa.*, at the suit of one *Pike*. On the 26th the plaintiffs demanded the piano of the sheriff, who was then in possession, and gave him notice not to sell, as being their property. On the 27th the defendants sold the piano.

Where goods lent on hire have been wrongfully taken in execution by the sheriff: Held, that the owner cannot maintain trover against the sheriff, he not having the right of possession as well as the right of property at the time of the sale.

Talfourd, for the defendants, contended, that this action could not be sustained ; that, at the time of the sale, the plaintiffs had neither the possession or right of possession ; the month for which the piano had been hired not having expired, and

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PAIN

v.

WHITTAKER.

cited *Gordon v. Harper*, 7 T. R. 9. as an authority directly in point.

Scarlett and Comyn relied on the cases of *Wooderman v. Baldock*, 8 Taunt. 676. and *Læschman v. Machin*, 2 Stark. 311., and stated, that the case of *Gordon v. Harper* had been over-ruled at *Nisi Prius*.

ABBOTT Ld. C. J. I am not aware that the case of *Gordon v. Harper* has been over-ruled; it is cited in the last edition of *Setwyn's Nisi Prius*, without any notice that it has been over-ruled. I think myself bound by that case; the principle on which it proceeds is, that the plaintiff has neither the possession or right of possession of the goods at the time they are taken, and therefore the allegation, that "he was lawfully possessed," is not supported by the evidence. That is so here, and therefore I am of opinion that the plaintiff cannot sustain this action.

Nonsuit. (a)

Scarlett and Comyn for the plaintiffs.

Talfourd for the defendant.

(a) *Vide Parry v. Frame*, 2 B. & P. 451., and *Smith v. Plover*, 15 East, 607.

1824.

REX v. POWELL.

WESTMINSTER,
June 10, 1824.

INDICTMENT for perjury, in an answer to a bill in Chancery.

The indictment described the bill as exhibited against three persons only, *viz.* A., B., and C.; the bill, upon being produced, appeared to be against four, *viz.* A., B., C., and D.

The *Attorney General* submitted that this was a fatal variance, and that it could not be considered as the same bill.

The counsel for the prosecution relied on *Rex v. Benson*, 2 Campb. 508.

ABBOTT Ld. C. J. I think this is not a valid objection, and that the bill produced must be considered as the same described in the indictment. If the indictment had professed to set forth the title of the bill, such a variance as this would have been fatal; but the bill is substantially described, and that is sufficient.

Guilty.(a)

Scarlett, *Gurney*, and *Broderick* for the prosecution.

The *Attorney General* and *Tindal* for the defendant.

(a) See also the cases of *Rex v. Roper*, 1 Starkie, 518., and *Mountstephen v. Brooke*, 1 B. & A. 224.

In an indictment for perjury in an answer to a bill in Chancery, the bill was described as exhibited against three persons only, A., B., and C. The bill, upon being produced, was against four, A., B., C., and D.: Held that this was no variance.

1824.

ADJOURNED SITTINGS AT GUILDHALL.

GUILDHALL,
June 15, 1824.

COSIO and others v. DE BERNALES.

Seemle, that although by the laws of a foreign country, husband and wife, natives of that country, and resident there, may be partners in trade, they cannot maintain a joint action against persons resident here, for a balance due to the partnership account.

Assumpsit, money had and received.

This action was brought by the plaintiffs, who were natives of *Spain*, and resided in that country, to recover a balance of account due to them from the defendants, who were merchants in the city of *London*.

To prove who were the partners in the firm of *Cosio and Co.*, a *Spaniard* was called, who stated the firm to consist of the husband and his wife, and their two sons, who were minors, and they were the persons named as plaintiffs on the record.

Scarlett, for the defendant, submitted that the plaintiffs must be nonsuited; that husband and wife could not sue here as partners.

Gurney stated, that he was informed that, according to the law of *Spain*, there was not a community of goods between husband and wife, and that consequently they might be partners in trade, although he was not in a condition to prove what was the law of *Spain*: he submitted that the court would presume, from the witness having stated that they were considered as partners in *Spain*, that such a partnership was valid, according to the laws of that country; and if such was the law of *Spain*, he contended, that they might certainly sue

here jointly, although they stood in the relation of husband and wife.

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COMO

v.

DE BERNALES.

ABBOTT Ld. C. J. You are now suing according to the law of *England*, and according to that law husband and wife cannot join in an action like the present. If you have recourse to an *English* tribunal, you must place such a plaintiff before that tribunal as can by the laws of this country be permitted to sue. It is however unnecessary, in the present case, to decide the general question, because no evidence has been given to show what is the law of *Spain* upon this subject; it does not therefore appear that husband and wife can be in that country partners, and in the absence of all proof upon the subject I cannot presume that the law is what the learned counsel has suggested it to be.

Nonsuit.

Gurney and *Kaye* for the plaintiffs.

Scarlett for the defendant.

Vide Dutch West India Company v. Van Moses, 1 Strange, 612.



CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS IN AND AFTER

TRINITY TERM,

5 GEO. IV. 1824.

SECOND SITTINGS IN TERM AT WESTMINSTER.

FRANCIS v. WILSON.

WESTMINSTER,
June 28, 1824.

DEBT on bond.

This action was brought upon a bond in the penal sum of 120*l*. conditioned for the repayment of the sum of 120*l*. with lawful interest.

The damages stated in the declaration were 10*l*.

It appeared that the interest upon the 120*l*. amounted to the sum of 17*l*.

Andrews for the plaintiff, contended, that in this case he was entitled to interest up to the extent of the damages laid in the declaration.

In debt on bond in the penalty of 120*l*. conditioned for the repayment of the same sum with lawful interest; held, that interest was recoverable beyond the penalty, to the amount of the damages laid in the declaration.

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 FRANCIS
 v.
 WILSON.

LITLEDALE J. In this bond the penalty and the debt are each for the sum of 120*l*. ; but it is expressly provided by the bond, that it shall carry interest. Under these circumstances, therefore, I am of opinion that the plaintiff is entitled to recover interest as far as the amount of damages laid in the declaration. This debt carrying interest, the jury are at liberty to give interest by way of damages for the detention of the debt.

Verdict for the plaintiff. (a)

Andrews for the plaintiff.

Reader for the defendant.

(a) Lord *Lonsdale v. Church*, 2 T.R. 388. *Wilde v. Clarkson*, 6 T.R. 303. *M'Clure v. Dunkin*, 1 East, 436. *Hilhouse v. Davis*, 1 M. & S. 169.

SECOND SITTINGS IN TERM IN LONDON.

GUILDHALL,
 June 30, 1824.

R. W. WEBB, by R. W. his Prochein Amy,
 v. SMITH.

The declarations of prochein amy made before action brought, are not admissible for the defendant.

ASSUMPSIT for work and labour by an infant, who sued by his father as prochein amy.

In the course of the cause, the declarations of the father made before action brought, were given in evidence by the defendant, and cross-examined to by the counsel for the plaintiff.

During the summing up, an objection was made by *Scarlett* for the plaintiff, to the admissibility of such evidence. And

LITLEDALE J. said, that he was clearly of opinion, that the declarations, if objected to in time, might have been rejected; but inasmuch as the counsel for the plaintiff had not objected, but had taken the chance of the evidence turning out to his advantage; it was then too late to exclude it.

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WEBB
v.
SMITH.

Verdict for the plaintiff.

Scarlett and Talfourd for the plaintiff.

Gurney and Denman C. S. for the defendant.

Vide *Eggleston v. Speke*, 3 Mod. 258. *Hopkins v. Neal*, 2 Str. 1026. *Dennison v. Spurling*, 1 Str. 506. *Cowling v. Ely*, 2 Starkie, N.P.C. 366. *Starkie on Evidence*, 2 v. 40.

SITTINGS AFTER TERM IN LONDON.

BENTALL and others, Assignees of BAKER
and others, v. BURN.

GUILDHALL,
July 10, 1824.

ASSUMPSIT, for goods sold and delivered.

This action was brought to recover the sum of 13*l.* 14*s.* 2*d.* for one hogshead of Sicilian wine, which the defendant had agreed to purchase of *Baker and Co.*, previous to their bankruptcy. The contract for the sale of the wine was not reduced into writing, but after the defendant had verbally agreed to purchase the wine, the bankrupt's clerk delivered to him an invoice of the goods, together with a delivery order, signed by *Baker and Co.*, of which the following is a copy :

A delivery order for wine lying in the London Docks, given by the vendor to the vendee, held not to be a sufficient acceptance of the wine to take the case out of the statute of frauds.

1824.
 BENTALL
 and others,
 Assignees of
 BAKER
 and others,
 v.
 BURN.

" *London, 13th January, 1822.*

" To the superintendant of the *London Docks.*

" Please to deliver to *Burn* and Co. the undermentioned goods, entered by *Baker* and Co. in the month of *January* 1821, per ship *Sicily*, Captain *Cupper*, from *Syracuse.*

" *Baker* and Co."

Mark	No.
" 5.	99. One hogshead of wine."

The defendant did not apply at the *London Docks* to have the wine transferred to him ; but at a subsequent period, when applied to for payment, he refused, alleging that he had lost the delivery order, and that he should not now accept the wine.

F. Pollock, for the defendant, contended that there was no *acceptance* of the goods within the meaning of the 17th section of the Statute of Frauds so as to make the contract binding on the defendant.

Gurney and *Barnewall*, contended that what had been done in this case was tantamount to an actual delivery of the goods ; that this order for the delivery of the wine, received by the buyer from the seller, was such an acceptance as would entitle the seller to maintain an action against the buyer for breach of the contract without any written memorandum ; they contended that there was a distinction between a delivery order and a transfer order ; the former gives the vendee the absolute controul over the goods, and he may immediately

obtain possession of them, and cited *Searle v. Keeves*, 2 Esp. N. P. C. 598. *Chaplin v. Rogers*, 1 East, 192.

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BENTALL
and others,
Assignees of
BAKER
and others,
v.
BURN

ABBOTT Ld. C. J., was of opinion that the delivery order which the vendee had so received from the vendor, was not such an acceptance of the goods as would affirm the contract, and take the case out of the statute.

Nonsuit.

Gurney and *Barnewall* for the plaintiffs.
F. Pollock for the defendant.

In the following *Michaelmas Term*, *Barnewall*, moved to set aside this nonsuit, on the ground that the receiving of the delivery order was tantamount to an actual acceptance of the goods, and cited the cases relied on at the trial, but the Court refused the rule, being of opinion that there was no acceptance of the goods within the meaning of the statute.

SITTINGS AFTER TERM AT WESTMINSTER.

REX v. DUNSTON.

WESTMINSTER,
July 20, 1824.

THIS was an indictment for perjury, alleged to have been committed in an answer to a bill filed against the defendant in the court of Chancery.

In an answer in chancery to a bill filed against the defendant, for the specific performance of an agreement relating to the purchase of land: The defendant had relied on the statute of frauds (the agreement not being in writing), and had also denied having entered into any such agreement. Upon this denial in his answer the defendant was indicted for perjury. Held, that the denial of an agreement which by the statute of frauds was not binding on the parties was immaterial and irrelevant, and that the defendant was entitled to his acquittal.

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Rex
v.
DUNSTON.

It was stated in the bill that two persons of the name of *Wood* and *Simmons*, together with the defendant and one *Robinson*, had agreed to become co-partners in the purchase and resale of a freehold estate at *Battle-Bridge*, in the county of *Middlesex*; that it was agreed that the purchase money (15,000*l.*) should be paid and advanced by the defendant and *Robinson* in equal moieties, and that *Wood* and *Simmons* should take upon themselves the acting part, in letting and disposing of the estate, and that *Robinson* (who was an attorney) should prepare all the necessary conveyances.

In order to compel the specific performance of this agreement *Wood* and *Simmons* filed this bill against the defendant and *Robinson*.

It was not stated in the bill that the agreement was in writing, but it was alleged "that the said defendants had frequently, since the said contract was entered into for the said purchase of the said estate, admitted or declared, at divers times and on divers occasions, that plaintiffs and they the said defendants were interested and concerned in the said purchase of the said estate in manner hereinbefore mentioned."

The defendants in Chancery in their answer pleaded, that the alleged agreement not being in writing was within the fourth section of the statute of frauds, and could not be enforced. The defendants also denied in their answer the agreement as set forth in the bill, and denied that they had ever admitted that the plaintiffs and themselves were interested in the purchase of the estate as stated. Upon these denials by *Dunston* perjury was assigned.

It was admitted by the counsel for the prosecution, that the agreement mentioned in the bill was not in writing, and that there was not any memorandum or declaration of trust respecting it.

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 v.
 DUNSTON.

Scarlett on the part of the defendant, contended that this indictment could not be sustained; on the ground that the alleged perjury was not material or revelant to the matter at issue in Chancery. The agreement stated in the bill not being in writing, and there being no memorandum or declaration of trust respecting it; the defendant in his answer relies on the statute of frauds as a good ground of defence. The denial, therefore, of an agreement which the court had no power to enforce, was immaterial and irrelevant to the investigation of the several matters in the bill, and consequently, the prosecutor having failed in his proof of the materiality of the different denials in the answer, upon which perjury is assigned, the defendant is entitled to his acquittal.

The *Attorney-General, contrd.*, relied upon the case of *Bartlett v. Pickersgill*, 4 Burr. 2255., 4 East, 577. *in notis*, where a party was convicted of perjury for the denial of a parol agreement for the purchase of an estate, which parol agreement a Court of Equity had refused to enforce.

ABBOTT Ld. C. J. It does not appear from the short statement of the case which has been cited, and which is not very distinctly reported, whether the statute of frauds was there pleaded and relied on. But in the present case these defendants have

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 v.
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in their answer pleaded the statute, and insisted that this agreement not being in writing, and, relating to the sale of land, is within the fourth section of that statute, and cannot be enforced. As a judge of a court of common law, it is competent for me to form my opinion upon the construction of this statute, although I cannot be presumed to know how a Court of Equity might deal with it. The statute, for the wisest reasons, declares that agreements of this description shall not be enforced unless they are reduced into writing. These defendants, therefore, having insisted upon the statute in their answer, the question is, whether, under such circumstances, the denial of an agreement which, by the statute, is not binding upon the parties is material; I am of opinion that it was utterly immaterial. It is necessary that the matter sworn to, and said to be false, should be material and relevant to the matter in issue, the matter here sworn is in my judgment immaterial and irrelevant, and the defendant must be acquitted. Not guilty.

The *Attorney-General*, *Brodrick*, and *Law*, for the prosecution.

Scarlett, *Tindal*, and *Platt*, for the defendant.

ADJOURNED SITTINGS AFTER TERM IN LONDON.

GUILDHALL,
 July 23, 1824.

COOKE v. HUGHES.

In an action for a libel, the defendant has a right to have the whole of the publication read, from which the passages charged are extracts.

CASE for a libel.

The libel for which this action was brought was contained in a pamphlet, entitled "*The Stafford*

Peerage, or the Impostor Unmasked ;” and the first count of the declaration stated, that the defendant published a false and scandalous libel of and concerning the plaintiff, in a certain pamphlet entitled as above, containing in divers parts thereof, amongst other things, the false, scandalous, defamatory, and libellous matters following of and concerning the plaintiff; it then set out continuously several distinct passages, selected from various parts of the pamphlet, without any separation of the different extracts. The other counts respectively contained each one of the several extracts stated in the first. The pamphlet was a professed history of the life and adventures of the plaintiff, under a fictitious and libellous name, and contained several distinct charges of crimes committed by the plaintiff, the subject matter of criminal procedure, and opprobrious comments upon those crimes, and on the conduct of the plaintiff. There were also reports of two trials, in one of which the plaintiff was stated to have been convicted of bigamy, but afterwards pardoned in consequence of a doubt of the validity of the first marriage; the other was a report of a cause in which the plaintiff had sued for damages for a libel, charging the plaintiff with bigamy and other offences, in which action the then defendant had justified; and the speech of the counsel for the defendant was stated at length, and the verdict of the jury for one farthing damages.

The only evidence was the proof of publication of the pamphlet, the application to the plaintiff appearing from the pamphlet itself.

Upon the officer proceeding to read the passages set out in the declaration,

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Scarlett for the defendant, claimed that intervening passages, which he pointed out, might be read, and insisted on the general right of the defendant to have the whole of the publication, for which he was answering, read; and stated that his object in having the parts read was, to show that the plaintiff had selected in his declaration vague and general abuse and comments, including no specific allegations which the defendant could justify and prove; whereas the pamphlet itself contained distinct charges, which, if set out, the defendant would have had an opportunity of proving, and which, if true, fully justified the defendant in applying to the plaintiff the passages selected in the declaration:

This was resisted by the counsel for the plaintiff, who argued that the only legitimate excuse for a defendant's reading other passages than those set out, was to explain and mitigate. That those now required to be read were separate libels, unconnected with the passages selected; and the object of the defendant was to blacken the character of the plaintiff, by stating matter still more libellous; and they referred to a recent indictment for a blasphemous libel impugning the truth of Christianity, in which his lordship had refused to allow the defendant, who conducted his own defence, to read other passages than those charged in the indictment.

ABBOTT Ld. C. J. I do not recollect an instance of an action in which the defendant has been prevented from reading the whole of the publication complained of. In the trial referred to, which I now distinctly recollect, the principle up-

on which I restrained the defendant from reading other passages was that just stated by Mr. *Gurney*, (a) namely, that the defendant himself professed that his object in selecting those passages was to show that the Christian religion was false ; I thought that a person on his trial for a libel on the Christian religion, should not be allowed to make his defence a vehicle for the very crime for which he was answering. But in actions, I have always understood the rule to be, that the defendant has a right to have the whole of the publication read. In the present state of the cause I cannot tell what the effect of reading the passages selected may be. If the object be further to libel the plaintiff, the defendant does it at his immediate peril, and the jury, if they shall think fit, may give increased damages on that account. In the absence of any case in which such a course has been refused, I think myself bound by the general rule, but I will take a note of the objection.

The other passages were then read, containing distinct charges of indictable offences, and the reports of the two trials ; and *Scarlett*, in his address to the jury, argued that the plaintiff having, by omitting to set out in his declarations the specific facts stated in the pamphlet, precluded the plaintiff from the opportunity of proving them, must be taken to have admitted their truth, and that a person who brought an action for the purpose of vindicating his character, and at the same time

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(a) *Gurney*, as *amicus curiæ*, had stated the circumstances of the case referred to, in which he conducted the prosecution.

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prevented the jury from trying that character, could not be entitled to any damages.

Verdict for the plaintiff, damages one farthing. (a)

Denman C. S., and *Campbell*, for the plaintiff.
Scarlett and *Patteson* for the defendant.

An objection was also taken to the first count on the ground of variance, but it was not pressed, the other counts being sufficiently proved. But his lordship said; As at present advised, I think the first count not sustained, the passages on the face of it purporting to be one continued extract.

(a) *Rex v. Lambert and Perry*, 2 Campb. 398. 31 How. St. Tr. 340.

GUILDHALL,
 July 26, 1824.

AUSTEN, Esq. late Sheriff of Kent, v. WARD.

Where the sheriff, having paid over the proceeds of goods taken under a *f. fa.* against I. A., was sued in trover by the assignees of

ASSUMPSIT on the usual money counts.

This action was brought to recover back the sum of 52*l.* which had been paid to the defendant by the plaintiff as the proceeds of a *fi. fa.* against one *Jagger Ansell*, issued at the suit of the defendant.

I. A. under a commission of bankrupt, and gave notice to the creditor to defend the action, and upon his refusal let judgment go by default, and paid over the value of the goods to the assignees; held, that the sheriff was not bound to defend the action, but might recover against the creditor the money paid him, upon proving the validity of the bankruptcy.

The sheriff took possession of the goods under the writ on the 12th *April* 1823, sold on the 25th, and paid over the proceeds to the defendant on the 28th of the same month. On the 29th a commission of bankrupt against *Ansell* was sued out, the docket having been struck on the 24th, and *Ansell* was declared a bankrupt on an act of bankruptcy, which took place previously to the execution.

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The assignees brought an action of trover against the sheriff, in which he suffered judgment to go by default, and the assignees recovered to the amount of all the money received by the sheriff on the sale of the goods. Previously to suffering judgment to go by default, the plaintiff had given the defendant notice of the action, and of his readiness to defend the same on the behalf of the defendant, and of his intention to let judgment go by default, in case the defendant would not come forward and furnish the means of defending the suit.

The judicial proceedings in the former action, and the execution and levy having been proved by admissions, the plaintiff then produced the proofs of the bankruptcy of *Ansell*, and the question turned on the validity of the act of bankruptcy, to which the plaintiff's witnesses were cross-examined in order to show that it was concerted.

Upon the close of the plaintiff's case, *Gurney* for the defendant, submitted that there must be a nonsuit, inasmuch as the plaintiff, by having omitted to defend the action brought by the assignees, must be taken to have made the payment

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voluntarily, and therefore could not recover ; to which

ABBOTT Ld. C. J., said that the defendant in this case having received notice of that action, might himself have defended it, and that the plaintiff here had to prove precisely the same question which he might have disputed there, namely, the validity of the bankruptcy ; and after *Gurney* had addressed the jury, his lordship left it to them, upon the whole evidence, to say whether or not the act of bankruptcy proved, had been concerted between the bankrupt and the petitioning creditor, directing them, if they were of that opinion, to find for the defendant.

Verdict for the defendant (a).

Scarlett and *D. F. Jones* for the plaintiff.
Gurney and *Campbell* for the defendant.

(a) *Wilson v. Milner*, 2 Campb. 452.

GUILDHALL,
July 30, 1824.

GALE v. DALRYMPLE.

The declaration in trespass contained five counts, each charging several as-

TRESPASS for assault and false imprisonment. The first count stated that the defendant, on the 26th day of *April* 1824, and on divers other days, assaults. The defendant pleaded first not guilty, secondly, that the assaults in the different counts were one and the same, and then justified. Replication, *de injuria*, &c. generally, and issue thereon. Held, that the plaintiff could not recover on any other assault than the one specified in the plea.

&c. at, &c. in and on board a certain ship called the *Vansittart*, assaulted the plaintiff, and gave him a great many blows, &c. ; and against the will of the said plaintiff, placed and kept him in irons for one week, by means whereof, &c. Second count, that the defendant, on the same day and year, and on divers other days, &c. at, &c. again assaulted the plaintiff, &c., and with a certain rope gave and struck him a great many blows, &c., and placed and kept him in irons for one week, by means, &c. Third count, that defendant afterwards, on the same day and year, and divers other days, &c. again assaulted the plaintiff, then being a mariner in and on board a certain other ship, and with a certain other rope, gave and struck him a great many blows, whereby, &c. Fourth count, that defendant afterwards, on the same day and year, and divers other days, &c. at, &c., assaulted, beat, and bruised the plaintiff, and imprisoned him for one week, whereby, &c. Fifth count, that the defendant, on the same day and year, and on divers other days, &c. at, &c. again assaulted, and again bruised, &c. whereby, &c.

The defendant pleaded first, not guilty, on which issue was joined.

Secondly, that the assaulting plaintiff on board the said ship *Vansittart*, and giving and striking the plaintiff a few blows, and putting and placing the plaintiff in irons, and imprisoning him for part of the time, to wit, twenty-four hours, in the first count mentioned ; the assaulting plaintiff and with a certain rope giving and striking plaintiff a few blows, and putting and placing him in irons for twenty-four hours, part of the time in the second

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count, and the assaulting the plaintiff, and with a certain rope giving and striking a few blows, in the third count, and the assaulting and beating, bruising, and ill-treating, and imprisoning for twenty-four hours, part, &c. in the fourth count, and the assaulting, beating, &c. in the fifth count, *are one and the same assaulting, striking, imprisoning, &c.* and not other and different. And then justified that the defendant was master and commander of the *Vansittart*, and the plaintiff a mariner and seaman belonging to the same, and that the plaintiff just before the first of the said times, when, &c. in the declaration mentioned, did disobediently and undutifully behave himself, and neglected his duty as such mariner, and did become, and was drunk, riotous, and incapable of discharging his duty. Whereupon the defendant did, on the first of the said times, when, &c. for the preservation of the necessary discipline on board the said ship, imprison and moderately chastise and correct the plaintiff, which, &c.

Replication, that the defendant, at the said several times in the declaration mentioned, of his own wrong, and without any such cause as defendant in his said plea alleged, committed the said several trespasses, in the introductory part of said plea mentioned, in manner and form as plaintiff hath above thereof complained against defendant.

Issue thereon.

It appeared in evidence that the defendant was master of the *Vansittart*, one of the *East India Company's* ships, and on the 26th of *April* last, being on his homeward voyage, he went on board the *Wellington*, another ship then in company;

the plaintiff, one of the *Vansittart's* mariners, and six other men manned his boat, and on getting into the boat to return to his own ship, the defendant found her in great danger, and the plaintiff who had charge of her drunk. He struck the plaintiff in the boat, and immediately on reaching his own ship had him put in irons, and afterwards flogged.

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There was contradictory evidence as to the plaintiff's being drunk, and *Gurney* in his reply contended that at all events he was entitled to a verdict for the assault committed in the boat, the defendant's justification being confined to the flogging and imprisonment on board the ship.

ABBOTT Ld. C. J., in summing up, told the jury that the assault committed in the boat was not put in issue; that the plaintiff had by the pleadings narrowed the question to one transaction, and the only fact left for them to consider was, whether or not he, on the occasion justified by the plea, was drunk, and had conducted himself in an undutiful and riotous manner.

Verdict for the defendant.

Gurney and *E. Lawes* for the plaintiff.

Scarlett and *F. Pollock* for the defendant.

We have been favoured by a gentleman at the bar with the following note.

In *Gibson v. Hawkey*, E. 55 G. 3. K. B. The first count of the declaration stated, that the defendant, on the 5th September 1812, and on divers other days between that day and the day of exhibiting the plaintiff's bill, assaulted the plaintiff on board a ship; and, on those several days, with a certain rope,

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struck him several blows. The second count stated, that the defendant, on the 15th *November*, and on divers other days, &c. assaulted the plaintiff, and beat him, &c. And, the third count was simply, for an assault on the 15th *November*. The defendant pleaded, first, not guilty; 2dly, as to the assaulting the plaintiff on board the ship mentioned in the first count, and with the said rope, giving him the said blows, and assaulting, beating, and bruising him, mentioned in the second count; and making the assault in the last count: that the assaulting and striking the blows in the first count, and assaulting, beating, and bruising in the second count, are one and the same, and not other or different trespasses; and that the assault in the last count is a part of the trespasses in the first count, and not another or different assault; and that, before the said time when, &c. he was master of a ship, and the plaintiff mariner, and that he neglected his duty, &c. and so justified, that he did, at the said *time* when, &c. moderately chastise him, which are the same supposed trespasses. To this the plaintiff replied, that the defendant, at the said *time* when, &c. *de injuriâ, absque tali causâ*, committed the said several trespasses in the introductory part of the plea mentioned.

At the trial of the cause, at the sittings after *Michaelmas* term, 1815, a verdict passed for the defendant. And in *Hilary* term following, *Curwood* moved for a N.T., on the ground, that the plaintiff at the trial was only allowed to go into evidence of one assault. He stated, that the plaintiff was about to prove another, but was stopped. Rule *nisi* granted. But it was, on argument, afterwards discharged; because the assaulting at the said *time* when, &c. in the singular number, in the PLEA, confines it all to one assault.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

TRINITY TERM,

5 GEO. IV. 1824.

ADJOURNED SITTINGS AT WESTMINSTER.

WICKS *v.* GOGERLEY.

WESTMINSTER,
July 10, 1824.

Assumpsit on a special agreement to pay 100*l.* by instalments, reciting that there had been a loan of the said sum, and securities given for it, that those securities had been given up and destroyed, and the present agreement substituted.

The sum (100*l.*) had been originally advanced upon the security of a promissory note at three months for 105*l.*; at the expiration of the first three months the defendant had paid 5*l.* and given another note at three months for 105*l.* On this latter note becoming due, 5*l.* was paid, and the pre-

A promise to pay the principal originally lent on an usurious agreement, is invalid, unless all payments beyond legal interest are repaid or deducted.

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sent agreement, which was free from usury on the face of it, was entered into.

For the plaintiff it was argued, that the new agreement being for the sum originally advanced, with legal interest, was freed from the taint of the usury in the *first* transaction, and *Barnes v. Hedley*, 2 Taunt. 184. was cited.

BEST C. J. The principle established by the case referred to, is ; that where parties who have contracted and acted upon an usurious engagement, state an account, and agree upon the sum which would be due for principal and legal interest after deducting all that has been paid beyond legal interest ; and a fresh promise is made to pay that sum, such promise is free from the original usury, and is perfectly valid in law. But in order to bring this case within that principle, you must be satisfied that every shilling which has been paid beyond legal interest has been repaid or deducted ; instead of which you find that payments for one half-year's interest at the rate of 20 per cent. have been made and retained. If you believe the witness who has sworn to the original agreement, your verdict must be for the defendant.

Verdict for the defendant.

Vaughan Serj. and *Chitty* for the plaintiff.
Pell Serj. for the defendant.

See *Chapman v. Black*, 2 B. & A. 588. *Preston v. Jackson*, 2 Stark. N. P. C. 237.



 ADJOURNED SITTINGS IN LONDON.

1824.

BLOGG *v.* PINKERS, Administrator of
PINKERS.

GUILDHALL,
July 19, 1824.

ASSUMPSIT on a promissory note for 180*l.* payable to the plaintiff or order, in "consideration of his care and medical attendance bestowed on the maker."

Notice of intention to dispute the consideration of the note had been given; and the defence was, that the services of the defendant in the character of an apothecary, and medicines furnished to the maker of the note, formed the consideration, if any, and that being so, that the plaintiff could not recover upon the note without showing that he had obtained his certificate under the 55 *Geo. 3. c. 194. s. 21.*

It was answered for the plaintiff, that the consideration stated in the note did not necessarily imply services as an apothecary, and that the plaintiff in suing upon the note was not bound to bring himself within the provisions of the statute, though it might be otherwise if he had sued for the attendance and medicines.

In an action by payee of a promissory note, expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker:" held that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary; and if that was proved, that the plaintiff could not recover without bringing himself within 55 *G. 3. c. 194. s. 21.*

BEST C. J. I shall leave it to the jury to say whether the services for which this note was given were those of an apothecary; if the defendant was not a physician or surgeon, but acted in the character of an apothecary, I think he cannot recover

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upon this note without bringing himself within the provisions of the statute referred to.

Nonsuit with consent of plaintiff's counsel.

Vaughan Serj. and *F. Pollock* for the plaintiff.
Pell Serj. and *Comyn* for the defendant.

GUILDHALL,
 July 24, 1824.

CLARKE v. SAFFERY.

On the trial of an issue from the Court of Chancery, with power to the plaintiff to examine the defendant as a witness; held, that as matter of right, plaintiff's counsel might cross-examine the defendant, although called as his witness; the defendant standing in a situation necessarily adverse.

THIS was an issue directed by the Vice-Chancellor to try "whether a commission of bankruptcy in which the defendant was the petitioning creditor, had been concerted between the defendant and the bankrupt."

The Vice-Chancellor's order gave the plaintiff leave to examine on the trial both the defendant and the bankrupt.

In the course of the trial the plaintiff's counsel called the defendant, who was also one of the assignees, as a witness, and on an objection being taken by the defendant's counsel to the mode of examining the defendant,

BEST C. J. said, there is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as is the case here, the counsel may, as matter of right, cross-examine him.

Vaughan Serj., and *Campbell* for the plaintiff.
Pell and *Taddy* Serjts., for the defendant.

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In *Bastin v. Carew, Exeter, August* 19th, 1824,
 where a similar objection was taken, and a cross-
 examination of an adverse witness allowed,

ABBOTT Ld. C. J. said, I mean to decide this,
 and no further. That in each particular case there
 must be some discretion in the presiding judge as
 to the mode in which the examination shall be con-
 ducted, in order best to answer the purposes of
 justice.

POCOCK v. BILLINGS.

GUILDHALL,
 July 27, 1824.

ACTION by the indorsee against the acceptor of a
 bill of exchange.

The defence was, that *Gray*, the drawer of the
 bill, had negotiated it after he had become bank-
 rupt, and that neither the plaintiff, nor several other
 indorsers, had given any consideration for the
 bill. The assignees were the real defendants.

The declar-
 at ions of a
 former holder
 of a bill of ex-
 change, made
 during his pos-
 session, are
 evidence
 against a sub-
 sequent in-
 dorsee.

For the defence the declarations of an indorser,
 made whilst he was holder of the bill, were, after
 objection, received by BEST C. J., as being made
 against his own interest by showing he had no title.
 His lordship likened the case to that of declar-
 ations made by the owner of an estate during his
 possession.

Nonsuit by consent.

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Pell Serj. and *Andrews* for the plaintiff.
Vaughan and *Wilde* Serjts. for the defendant.

Vide Pocock v. Billings, 2 Bing. 269.

GUILDHALL,
 July 28, 1824.

WRIGHT *v.* PAULIN and Another.

A co-defendant against whom the plaintiff has given no evidence, has no right to an acquittal to be made a witness, until all the other evidence for the defendants is finished.

CASE for an excessive distress, with a count in trover.

For the plaintiff a *prima facie* case in trover against one of the defendants was proved, and there was no evidence whatever against the other.

Vaughan Serj. then claimed an acquittal for the latter, in order to make him a witness.

BEST C. J. The defendant has no right to an acquittal until all the evidence, except that which he may himself have to give, is gone through, and then, if nothing appears against him, he may be acquitted to be made a witness. If you state that you do not intend to call witnesses, he may be acquitted now, but not otherwise.

Verdict for the plaintiff against one defendant.

Wilde Serj. and *E. Lawes* for the plaintiff.
Vaughan Serj., and *Comyn* for the defendants.

See Phillipp's on Evidence, 6th edit. 2 vol. 304.

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SUMMER ASSIZES, 5 GEO. IV.

OXFORD CIRCUIT.—HEREFORD.

Coram PARK J.

ROGERS v. JONES, Clerk.

August 18.
1824.

TRESPASS and false imprisonment, plea, not guilty.

It appeared that the plaintiff had been brought before the defendant, who was a magistrate of the county of *Cardigan*, upon a charge of having cut and taken away some ash trees, the property of one *Thomas Davies*. The magistrate having heard the complaint, fined the plaintiff 20*l.* (a), and upon his

In an action against a magistrate for false imprisonment; held, that a conviction filed at the quarter-sessions was no justification of the defendant, where

it appeared to have been framed upon a different statute from that of the commitment. Held, that the 43 G. 3. c. 141. s. 2. only applied to cases where the conviction had been *quashed*, and that the guilt of the plaintiff could not be given in evidence in mitigation of damages, where the plaintiff only sought to recover the amount of a sum he had been fined, and which fine he had paid in order to be discharged from the commitment.

(a) By the 15 *Car. 2. c. 2. s. 2.* it is enacted, that from and after the 24th *June* next ensuing, every constable, headborough, or any other person in every county, city, town corporate, or other place, where they shall be officers or inhabitants, shall and may by virtue of this act have full power and authority to apprehend, or cause to be apprehended all and every person or persons they shall suspect, having or carrying, or anyways conveying, any burthen or bundles of any kind of wood, underwood, poles, or young trees, or bark, or bast of any trees, or any gates, stiles, posts, pales, rails or hedge-wood, broom or furze; and by a warrant under the hand and seal of any one justice of the peace, directed to any officer, such officer shall have power to enter into, and search the houses, out-houses,

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refusing at a subsequent period to pay the fine, the defendant delivered to a constable a warrant of commitment, upon which the plaintiff was apprehended, and who, after being a short time in cus-

yards, gardens, or other places belonging to the houses of all and every person or persons they shall suspect to have any kind of wood, underwood, &c. and wheresoever they find any such, to apprehend and cause to be apprehended, all and every person and persons suspected for the cutting and taking of the same, and them and every of them, as well those apprehended carrying or any ways conveying any kind of wood, underwood, &c., as also those in whose houses or other places belonging to them, any such wood, underwood, &c. shall be found, to carry before one justice of the peace of the same county, city, &c. and if the said person or persons so suspected, apprehended, and carried before the said justices, do not then and there give a good account, how he and they came by such wood, underwood, &c. by the consent of the owner, such as shall satisfy the said justice, or else shall not within some convenient time, to be set by them the said justices, produce the party or parties of whom they bought the same wood, underwood, &c. or some other credible witness, to depose upon oath such sale of the said wood, underwood, &c. (which oath the said justice hath hereby power to administer), that then the said person or persons so suspected, and not giving such good account, nor producing any such witness upon oath, to testify the said sale as aforesaid, shall be deemed and adjudged as convicted of the said offence of cutting and spoiling of the same woods, underwoods, &c. within the meaning of the said statute of queen *Elizabeth* (43 *Elix.* c. 7.), and shall be liable to the punishment therein contained, and to such other proceedings and punishments as by this further act shall be further constituted and appointed on that behalf.

By s. 3. it is enacted, that all and every person or persons convicted of the said offence in manner and form before in this act mentioned, shall, for the first offence, give the owner or owners such recompense or satisfaction for his or their damages, and within such time, as the said justice shall appoint,

today, was released by the constable upon paying the 20*l.* and costs, amounting to 3*l.* (a)

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and over and above, pay down presently unto the overseers, for the use of the poor of the parish where the said offence or offences were committed, such sum of money (not exceeding ten shillings) as the said justices shall think meet; and if such offender or offenders do not make recompense or satisfaction to the said owner or owners, and also pay the said sum to the poor in manner and form aforesaid, then the said justice shall commit the said offender or offenders to the house of correction for such time as the said justice shall think fit, not exceeding one month, or to be whipped by the constable or other officer, as in his judgment shall seem expedient.

(a) The following is a copy of the commitment:—

Cardiganshire, } TO the high constable of *Ilar*, and to the constable of the parish of *Gwnnws*, and to the keeper of the house of correction at *Cardigan*, in this county.

Whereas *Thomas Davies*, of *Wernfelin* in the said county, gentleman, on the said 22d day of *March* last past, did make oath before me *John Jones*, clerk, one of His Majesty's justices of the peace for the said county, that, within the space of three weeks then last past, a certain quantity of wood, his property at *Penylan*, in the parish of *Gwnnws*, in the county aforesaid, was cut and spoiled, and from thence taken and carried away, and that he had just cause to suspect, and did suspect that *David Rogers*, of *Llwynllwyd*, in the said county, yeoman, did cut and spoil, take and carry away the same. And whereas a certain quantity of wood, to wit, two ash-trees, suspected to be stolen, were, on the 23d of *March* last, by virtue of my warrant for that purpose, directed to the constable of *Gwnnws*, in the said county, found in the cowhouse and haggard of the said *David Rogers*. And whereas the said *David Rogers*, on the 30th day of *March* last past, having been brought before me, did not, and could not give to me any satisfactory account how he came by the said wood, nor could produce the party

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For the defendant a conviction regularly returned to the court of quarter sessions, and filed among the records, was put in, which his counsel contended would be conclusive on the matter therein stated, and entitle the defendant to a verdict. (a)

of whom he bought the same, or any credible witness to satisfy upon oath the sale thereof, and thereupon was by me convicted of cutting and spoiling the said wood, and ordered to pay the said *Thomas Davies*, the owner of the said wood, the sum of 11s. within twenty-five days next ensuing, in recompense and satisfaction for damages, and also the sum of 20*l.* to the overseers of the poor of *Gwynnws* aforesaid, where the said offence was committed, for the use of the poor of the said parish. And whereas it appears to me that the said several sums have been duly demanded of him the said *David Rogers*, but that he hath refused and doth refuse to pay, and hath not yet paid the same nor any part thereof. I do therefore hereby require you the said constables of *Ilar* and *Gwynnws* aforesaid to carry the said *David Rogers* to the said house of correction at *Cardigan* aforesaid, and to deliver him to the keeper thereof, together with this warrant. And I do hereby command you the said keeper to receive him into your custody, into the said house of correction, and there to detain him for the space of twelve months, herein fail not. Given under my hand and seal at *Tregaron*, the twenty-seventh day of *April*, in the year of our Lord one thousand eight hundred and twenty-four.

JOHN JONES. (L. S.)

(a) The following is a copy of the conviction : —

Cardiganshire, } BE it remembered, that on the 30th day of *March*
 to wit. } in the year of our Lord 1824, *David Rogers* of *Llwynllwyd*, in
 the parish of *Gwynnws*, in the county of *Cardigan*, yeoman, was,
 upon the complaint of *David Davies*, yeoman, convicted before
 me *John Jones*, clerk, one of the justices of the peace for the
 said county of *Cardigan*, in pursuance of an act passed in the
 sixth year of the reign of His Majesty *George* the Third, for
 that he the said *David Rogers* did, on or about the 19th day of
March last, go into the wood grounds of and belonging to *Tho-*

Russell for the plaintiff, objected that the conviction did not support the commitment, inasmuch as the conviction appeared to be of an offence against the 6 *Geo. 3. c. 48.*, whereas the commitment was for an offence against the 15 *Car. 2. c. 2.*, and was drawn according to the form given for that purpose in *Burn's Justice*. He contended that it was a general principle that the conviction must apply to the same offence as is stated in the commitment, so that it might appear, upon comparing the two instruments together, that the party was convicted of the offence for which he was committed. *Massey v. Johnson*, 12 *East*, 67. 82.

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PARK J. The conviction produced is, for all I can see, a piece of waste paper with reference to this commitment; the conviction is under the 6 *Geo. 3.*, which is a totally different statute from that of the commitment. I think the conviction not sufficient for the purpose for which it is tendered by the defendant's counsel.

The defendant's counsel then proposed to prove that the plaintiff was guilty of the offence, so as to protect the defendant under the 43 *Geo. 3. c. 141. s. 2.*

mas Davies, esq., of *Wernfelin*, in the parish of *Caron*, in the county aforesaid, and then and there did cut, spoil, take, and feloniously carry away two ash trees, not then having the consent of the said *Thomas Davies*, esq., the owner of the said wood, nor of any other person entrusted with the care thereof, for which offence the said *David Rogers* was by me, the said justice, ordered to forfeit and pay the sum of 20*l.* together with 3*l.* 0*s.* 6*d.* for the charges and expenses previous to, and attending the said conviction, this being his first offence. Given under my hand and seal, the day and year above written.

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and also contended that even if the statute did not apply to this case, the guilt of the plaintiff was admissible in evidence in mitigation of damages.

Russell contended, on the authority of *Gray v. Cookson*, 16 *East*, 13., that the statute of the 43 *Geo. 3. c. 141.* only applied to cases where there had been a conviction *quashed*; and that as to the admissibility of evidence of the plaintiff's guilt, in mitigation of damages, independently of the statute, that it could not be received, as he sought only to recover the 20*l.* actually paid by the plaintiff to the constable, to save himself from being taken to gaol, which were damages not capable of being mitigated, and to which the plaintiff must be at all events entitled.

PARK J. was of opinion, on the authority of the case cited, that the 43 *Geo. 3. c. 141.* applied only to cases where the conviction was quashed, and that at all events the plaintiff was entitled to recover damages to the amount of the money he had actually paid to the constable for his release.

Verdict for the plaintiff, damages 23*l.*

W. O. Russell and *D. S. Davies* for the plaintiff.

W. E. Taunton and Sir *W. Owen* for the defendant.

In the following *Michaelmas* term, Sir *W. Owen* moved for a new trial, *First*, on the ground that the conviction, regularly drawn up and filed at the quarter sessions, was a sufficient justification in this collateral proceeding, and cited the cases of *Strickland*

v. *Ward*, 7 T. R. 633. *in notis.* *Massey v. Johnson*, 12 East, 67., and *Gray v. Cookson*, 16 East, 13.; *Secondly*, on the ground that the defendant ought to have been permitted, under 43 Geo. 3. c. 141. s. 2., to prove the plaintiff guilty of the offence of which he was convicted, and contended, if it was held that those provisions of the statute only extended to actions on the case where the conviction had been quashed, it would put magistrates whose convictions were unimpeached and valid, in a worse situation than justices whose conviction had been quashed, which was an absurdity, and an injustice which never could have been contemplated by the legislature. And he also contended, that in any case the guilt of the plaintiff was evidence in mitigation of damages.

The Court, however, refused to grant a rule, saying, as to the first point, that in this case the magistrate was bound by the erroneous *commitment*, notwithstanding the regular *conviction*. And as to the second, that it had been decided, that the statute of the 43 Geo. 3. applied only to actions on the case where *the conviction had been quashed*. They were also of opinion that as the verdict had been given only for the amount of the penalty and costs which the plaintiff had paid, and not for any *vindictive* damages, there was no injury done by the rejection of the evidence, even if it were admissible, in mitigation of damages. .

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SUMMER ASSIZES, 5 Geo. IV.

WESTERN CIRCUIT.—WINCHESTER.

Coram ABBOTT, Ld. C. J.

JOLIFF v. BENDELL.

WINCHESTER,
Aug. 3, 1824.

Certain sheep, apparently healthy and sound in every respect, were sold warranted sound. Two months afterwards great part of them died. There was nothing to connect the disease of which they died with their previous condition; but it was, in the opinion of farmers and breeders, an hereditary disease, called the *goggles*, and incapable of discovery until its fatal appearance; held, that this disease was an unsoundness existing at the time of the sale, the jury being of opinion, that "it existed in the constitution of the sheep at that time."

ASSUMPSIT on a warranty of certain sheep sold by the defendant to the plaintiff.

The first count stated the sheep to be warranted sound. The second, *free from goggles*.

The sheep, one hundred in number, were sold on the 12th of *August*, 1823. At the time of the sale they were, in appearance, perfectly sound and thriving, and continued so until the middle of *October* following, when one or two of them exhibited symptoms of a disease called by farmers *the goggles*. The sheep affected showed signs of giddiness, swelling of the eyes and hanging of the head. From the time they were first seized, they grew weaker and weaker, and for the most part died in about a week or ten days, and, on dissection, there were signs of water in the head or brain. On the whole, about fifty of the sheep had died under the same appearances, the rest continued apparently well up to the time of the trial. There was no contagion: other sheep with which they were fed and kept having continued healthy. Several farmers and others conversant with sheep

were called for the plaintiff, who stated the goggles to be, in their opinion, an hereditary disease, arising from breeding "*in and in, or from relations ;*" and that sheep so disordered would thrive, and seem to be in sound health generally until two or three years old. That there were no means of discovering by the appearance or otherwise, that sheep were so affected. That it was generally fatal, and no cure or prevention known for it, and reputed amongst farmers an unsoundness. The evidence for the defendant went to show, that the sheep were of a pedigree free from "*breeding in and in,*" and that others of the same sort and older were perfectly sound. The warranty was proved without dispute, and the sheep were all of the same breed.

For the defendant it was contended, that the sheep having been healthy and thriving at the time of, and for two months after the sale, must be considered as sound at that time ; that, inasmuch as there were no previous symptoms to connect the disease of which they died with their former state of health, there was nothing to show that the disease existed at the time of the sale ; and that an hereditary liability to a particular disorder was of too uncertain a nature to be capable of proof, and could not be legally considered as an unsoundness existing at the time stipulated for in the warranty.

ABBOTT Ld. C. J. left it to the jury to say, "whether, at the time of the sale, the sheep had existing in their blood or constitution the disease of

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which they afterwards died ; or, whether it had arisen from any subsequent cause?"

Verdict for the plaintiff for 120*l.*, the value of the sheep which had died, the defendant agreeing to take back the remainder.

P. Williams and *Carter* for the plaintiff.

Wilde Serj., and *Tancred* for the defendant.

WINCHESTER,
August 6, 1824.

HOLMES v. LOVE and TUCKER.

A. B. being insolvent, conveyed by deed all his estate to trustees for the benefit of his creditors, with a proviso, that "if all and every the creditors of the said *A. B.*, whose debts do amount to more than 5*l.*, shall refuse to execute, or otherwise consent to this deed within six months from the date thereof, the said deed

USE and occupation.

The premises, for the rent of which this action was brought, had been let for a term of years to *Edward Edwards*, who had become insolvent, and by a composition-deed, dated *April* 19th, 1822, had assigned his real and personal estate and effects to *Woodman, Love, and Tucker*, in trust, to sell and distribute the proceeds, after payment of the expenses, amongst themselves and all other creditors who should execute the deed ; with the following proviso ; that " If all and every the creditors of the said *Edward Edwards*, whose debts do respectively amount to more than 5*l.*, shall refuse to execute, or otherwise consent to this deed within six months from the date thereof,

shall be void to all intents and purposes."

Held that a lease vested in the trustees, could not be defeated under this proviso without an express refusal of every creditor above 5*l.* to execute or consent.

the said deed shall be null and void to all intents and purposes." *Love and Tucker*, the two defendants, executed the deed, and proceeded to sell the crops and stock then on the estate, *Edwards* still continuing in possession. The half-year's rent due at *Lady-day*, 1823, was paid by them; and their liability for the subsequent half-year's rent, due at *Michaelmas* in that year, depended on the question, whether the estate which vested in them by the assignment had determined by the non-acquiescence of the creditors, none of whom had signed the deed.

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C. F. Williams, for the defendants, having stated, that he was in a condition to prove a distinct refusal by several of the creditors to execute or consent to the deed, but that he could not show any application to all the creditors, contended (with *E. Lawes*) that the proviso must be construed to mean, if *any* should refuse, *and* being construed *or*; and that the not signing was a refusal within the meaning of the proviso, and therefore the estate ceased at the end of six months.

ABBOTT Ld. C. J. (having looked through the whole deed) said, "I am of opinion, that the estate vested in the defendants by this assignment has not been defeated. And the whole case depends upon the construction of the proviso, on which two questions arise: 1st, Whether mere forbearance to sign is equivalent to a refusal. 2dly, Whether the words "all *and* every" must be taken to mean "all *or* every." Now, it must be recollected that the effect of the proviso is to

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defeat an estate already vested, the deed must therefore be construed strictly, and, I think, that mere forbearance to sign does not amount to a refusal after a notification. The word *refuse* must be understood according to its ordinary and common acceptation, and before a person can be said to refuse, his consent to the thing required must be asked, and an actual application is therefore necessary. As to the second question, it must be shown that the construction contended for, would more consist with the declared intention of the parties than the literal one. Now, the effect of the alternative construction would be to make void the deed, in case one out of one hundred creditors refused to sign, which would go to deprive the ninety-nine who chose to sign, as well as *Edwards* himself, of the benefits to be derived from the deed. The trust is to satisfy all the creditors who execute, and that object would also be defeated. Not being satisfied, therefore, that another construction than the literal one would be more conformable to the intention of the parties, I think the literal one must prevail. I entertain no doubt on the subject myself, and as this case has already been discussed before my brothers (a), I know that they are of the same opinion on both points. The defendants must show that all the creditors have been applied to, and have refused.

This not being done, the jury were directed to find a verdict for the plaintiff for 120*l*.

(a) This was a second trial, the case was argued in the sittings out of term, before the puisne judges of the court of King's Bench, see 3 B. & C. 242.

Sekwyn, Edwards, and Carter for the plaintiff.

C. F. Williams and E. Lawes for the defendants.

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In the *Michaelmas* Term following a new trial was moved for upon the points made at the trial; and also upon an error in the amount of the damages. The Court refused the rule *nisi* on the former grounds, but granted it on the latter only.

DOE on the Demise of TILMAN v. TARVER. WINCHESTER,
 Aug. 6, 1824.

EJECTMENT to recover possession of certain lands in *Areton* in the *Isle of Wight*.

The plaintiff claimed under the will of *Catharine Lady Fairfax*. The will was dated the 20th of *April*, 1719. Soon after which the testatrix died, and devised all her real estates to *A. B. and C. D.*, and their heirs for ever, in trust, out of the rents and profits to pay all her debts, funeral expenses, &c., and, after the payment of all debts and funeral expences, remainder to her first and other sons for life, and their issue in tail male respectively; remainder to her daughters in tail; remainder to her right heirs.

The plaintiff claimed as devisee of *Dennis Martin*, grandson of one of the daughters entitled to the

comparing it with other authentic old writings at the time of the trial.

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estate tail in remainder, and last surviving issue of the family.

In order to establish the pedigree, the declarations of the mother of *Dennis Martin*, showing the extinction of the issue of persons standing in the line of the entail between her and the then possessor of the estate, were offered.

Wilde, Serjt. objected, that these declarations were those of a person interested, inasmuch as the title of the plaintiff was that which the person making them would have had now if living, and which she had in contingency and expectation at the time of making them.

ABBOTT Ld. C. J. I think them admissible notwithstanding, having been made *ante litem mortuam*. I remember a case of title to a peerage before the House of Lords, in which the widow was allowed to prove the declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right which the declarations went to establish; and this has been followed up since. If no controversy existed at the time, the principle acted on is, that such declarations are admissible, though subject to observation.

In order to show that *Yard Farm* was part of the manor of *Areton*, which clearly passed under the will, a paper was put in, entitled, "An account of *Edward Haylis*, receiver of the *Isle of Wight* estates of the Lady *Fairfax* for two years ending at *Michaelmas*, 1727;" and containing,

amongst other entries relating to the manor of *Areton*, the following :

“ For rent,	£ s. d.
“ <i>John Pike</i> , for <i>Yard Farm</i> -	9 6 8”

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Edward Haylis appeared by the books and rolls belonging to the manor to have been steward, and this paper was handed over to the present steward, amongst other papers and books relating to the manor, by the representatives of the late steward.

It was at first offered without any proof of the handwriting; and, on this being objected to,

ABBOTT Ld. C. J. directed the person producing the paper to compare it with the handwriting of *Edward Haylis* in other papers belonging to the manor, and to say upon oath, whether he believed the writings were by the same person. His Lordship said he recollected Mr. Justice LAWRENCE, on a trial at *Worcester*, directing a Mr. *Benjamin Price*, then accidentally in court, to compare an ancient writing with other papers purporting to be written by the same person, and to give his opinion on the identity of the writings.

Verdict for the plaintiff.

Adam, Setwyn, and Manning for the plaintiff.
Wilde, Serjt. and Carter for the defendant.

Vide Phillipps on Evidence, 1 vol. 473. last edit.

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*DORCHESTER.**Coram ABBOTT, Ld. C. J.**DORCHESTER,*
*Aug. 12, 1824.***REX v. The INHABITANTS of the County
of DEVON.**

A bridge used only on occasion of floods, and lying out of and alongside the road commonly used; held a public bridge, and the county liable to repair.

INDICTMENT for non-repair of a bridge, in the usual form.

The bridge in question was approached by a causeway lying alongside the main road, which led through a ford close by and below the bridge. The causeway and bridge were open at all times to carriages, &c. but only used by the public in case of floods, which rendered the ford impassable; and, in very high floods, the bridge itself was impassable. There were no parapets, nor rails, nor ever had been; nor did it appear, that the bridge had ever been repaired, though its existence was spoken to for sixty or seventy years by old witnesses. The road leads from market-town to market-town.

It was objected that the averment, that the bridge was used by all subjects, &c. at all times, &c., was not supported, and the county was in these circumstances not liable.

ABBOTT Ld. C. J. The bridge is at all times open to the public, and may at all times be used, though, as matter of convenience, it is only used

in time of floods. I think the county liable to repair.

Verdict for prosecution.

Pell Serjt. and *C. F. Williams* for the prosecution.

Tancred for the defendants.

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Rex v. Inhabitants of *Northampton*, 2 M. & S. 262.

FRYER v. BROWN.

DEVON,
 Aug. 12, 1824.

ASSUMPSIT on the money counts, and a count for interest.

The plaintiff declared as the surviving partner of *Fryer* and — *Andrews*, deceased.

The defendant, in a conversation with a clerk in the plaintiff's bank, relating to the plaintiff's demand, admitted that he owed 147*l.* on a bill of exchange drawn by *Gilby* and *Ellis* on *Jones*, which he had indorsed to the plaintiff, and which had been returned dishonoured; and said, "I admit the debt, and you have your remedy against me, but I hope you will forego interest, and I will pay you the principal."

It was objected by *Pell* Serjt. that the bill of exchange being the foundation of the plaintiff's

Where two indorsements of the same party appeared on a bill of exchange, with an intermediate one of another person; held that the first indorsement must be presumed to have been made before the bill became due.

The plaintiff in *assumpsit* gave in evidence an admission of the defendant, that he owed 147*l.* on a bill of exchange which had been returned dishonoured; held that such acknowledgment was admissible, though no notice to produce the bill had been given: held also that interest was not recoverable unless the bill was produced.

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demand, notice to produce ought to have been given, and without the bill this conversation was inadmissible.

ABBOTT Ld. C. J. I am of opinion, that, upon the whole evidence, the plaintiff was not bound to give notice ; but, unless the bill is produced, I shall tell the jury not to give interest.

The bill was afterwards produced by the defendant, and was dated 13th *February*, 1813, at one month, for 147*l.*; it was indorsed by defendant in blank, by *Fryer* and Co. specially, to *Mortimer*, then by *Mortimer*, and again by *Fryer* and Co.

It appeared that one *Clapcott*, now living, was in partnership with *Fryer* and *Andrews* the whole of 1813; and a question being made as to the time of indorsement by defendant, to show that plaintiff, *Andrews* and *Clapcott* were in partnership when the bill was negotiated by the defendant with the bank.

ABBOTT Ld. C. J. said, the circumstance of *Fryer* and Co.'s indorsement being twice on the bill was so strong to show that they had taken and negotiated it before it became due, and re-indorsed it after it was returned dishonoured, that, unless proof to the contrary were offered, he should presume, that the first indorsement was in 1813.

The clerk who made the indorsement having been called, and stated he had no recollection of the time when it was made.

ABBOTT Ld. C. J. directed a

Nonsuit.

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Adam and E. Lawes for the plaintiff.

Pell Serjt. and R. Bayly, for the defendant.

See Cameron v. Smith, 2 B. & A. 305. *De Bellois v. Waterpark*, 1 Dow. & Ryl. 16.

BODMIN.

Coram GARROW B.

REX v. TREMEARNE.

BODMIN,
Aug. 25, 1824.

THIS was an indictment for perjury, charging that one *A. B.* had been tried and convicted upon an indictment, for certain offences therein mentioned; that *A. B.* afterwards obtained a rule, calling on the prosecutor to show cause why a new trial should not be granted, and that the defendant, in order to prevent the said rule from being made absolute, made the affidavit whereon perjury was assigned.

A judge at Nisi Prius may refuse to try an indictment clearly bad in point of law. An indictment for perjury, not averring the matters falsely sworn to, to be material, nor showing them to be so, is within this authority.

There was no averment that the matters falsely sworn to were material, nor could it be collected from the indictment that they were so.

Upon the case being called on GARROW B. pointed out the objection, and called upon the counsel

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for the prosecution to support the indictment. *Rex v. Souter*, 2 Starkie's N. P. C. 423. Russ. Cr. L. 1789, was cited.

GARROW B. I think this indictment is unquestionably bad, and that no future proceedings can be had upon it, in case the defendant should be convicted. I therefore think it my duty not to consume the time of the Court in a trial that can answer no beneficial purpose. And I am not acting on my own opinion merely, for I have the advantage of the Lord Chief Justice's authority, who is clearly of opinion that the indictment is bad, and that under such circumstances it is the duty of a judge not to proceed.

Cause not tried.

Pell Serjt., *Adam*, *Wilde* Serjt., and *Manning* for the prosecution.

C. F. Williams, *R. Bayly*, and *Carter* for the defendant.

See *Rex v. Deacon*, *supra*, 27.

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BRISTOL.

Coram ABBOTT Ld. C.J.

WALTER v. HAYNES.

BRISTOL,
Sept. 6, 1824.

THIS was an action of assumpsit upon a bill of exchange by an indorsee against an indorser.

In order to prove the notice of dishonour, it was shown on the part of the plaintiff, that a letter, containing such a notice, and addressed to " Mr. Haynes, Bristol," was put into the post-office.

ABBOTT Ld. C. J. This is not sufficient proof of notice. Where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of a delivery into the hands of that person; because it is a safe and reasonable presumption that it reaches its destination; but where a letter is addressed generally to *A. B.* at a large town, as in the present case, it is not to be absolutely presumed from the fact of its having been put into the post office, that it was ever received by the party for whom it was intended. The name may be unknown at the post-office, or if the name be known, there may be several persons to whom so general an address would apply. It is, therefore, always necessary, in the latter case, to give some further evidence to show that the letter did

A letter directed " Mr. Haynes, Bristol," containing notice of the dishonour of a bill, was proved to have been put into the post-office; held that this was not sufficient proof of notice, the direction being too general to raise a presumption that the letter reached the particular individual intended.

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in fact come to the hands of the person for whom it was intended.

Other evidence was then given, tending to show that the letter had been received by the person to whom it was addressed, and the plaintiff had a verdict.

Pell Serjt. and *Manning* for the plaintiff.
Bompas for the defendant.

Vide *Saunderson v. Judge*, 2 H. B. 509. *Parker v. Gordon*, 7 East, 385. *Kufh v. Weston*, 3 Esp. N. P. C. 54. *Scott v. Lifford*, 9 East, 347. S. C. 1 Campb. 246. *Hawkins v. Rutt*, Peake, N.P.C. 186.

CASES

ARGUED AND DECIDED

AT NISI PRIUS.

IN K. B.

AT THE SITTINGS AFTER

MICHAELMAS TERM,

5 GEO. IV. 1824-5.

ADJOURNED SITTINGS AFTER TERM AT
WESTMINSTER.

REX v. LYON and another.

WESTMINSTER,
Dec. 1824.

THIS was an indictment for a nuisance in obstructing a highway.

The highway was described in the indictment as "a common public highway, &c. for all the liege subjects of, &c. to go, return, &c. *with their horses, coaches, carts, and carriages*, in and along the same," &c.

It was proved, that the highway in question passed under an arch-gate way, nine feet broad and loaded in a particular manner could not pass along this highway: Held that this was not a misdescription, it not being laid as a highway for *all* carts, carriages, &c.

An indictment for a nuisance to a highway, stated it to be a way for *all* the liege subjects, &c. to go, &c. with their "*horses, coaches, carts, and carriages.*" The evidence was, that carts of a particular description,

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and ten feet high; through which carts of a particular description, loaded in a particular way, could not pass.

The counsel for the defendants objected, that the way proved was different from that described in the indictment, that the indictment should not have described this a highway through which "all the liege subjects of, &c. could go, return, &c. with their horses, coaches, carts, and carriages," &c. but have described the way particularly according to the fact.

LITLEDALE J. I have some doubt whether this indictment is properly framed in describing this as a way for "all the liege subjects of, &c. to go, return, &c. with their horses, coaches, carts, and carriages," &c.; as there are many carriages in use which could not pass through this way. I shall not, however, stop the case, but reserve the point for the defendants to move the Court upon it if they think fit.

One of the defendants was found guilty.

Gurney and for the prosecution.

Abraham for one of the defendants.

F. Pollock for the other.

In the following *Hilary* Term, *Abraham* moved on this point. But the Court were of opinion, that the objection ought not to prevail, the meaning of the indictment being that such coaches, carts, and carriages should pass along it as the

width of the road, or as in this case the archway would permit; it was not laid as a way for *all* carts, carriages, &c.

Rule refused.

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See *Allen v. Ormond*, 8 East, 4. *Rex v. Inhabitants of Hatfield*, *ibid.*, 6. n. a. *Rex v. Inhabitants of Northampton*, 2 M. & S. 262. *Rex v. Inhabitants of Lancashire*, Sum. Ass. 1820, Starkie's Evidence, Part 4. p. 316. *Rex v. Inhabitants of Devon*, *supra*, 144.

PARTRIDGE, q. t. v. COATES.

WESTMINSTER,
Dec. 14, 1824.

DEBT on 12 *Ann. st.* 2. c. 16. to recover penalties for usury.

The declaration stated, "that after the 29th day of *September* 1714, to wit, on the 3d day of *July* 1824, one *Thomas Dauncey* made his bill of exchange, bearing date the same day and year, directed to one *Daniel Orphen*, whom he thereby required to pay three months after the date, to his order, the sum of 100*l.*, which bill of exchange the said *Daniel Orphen*, on the same day and year accepted; and the said bill of exchange being so accepted, afterwards after the 29th of *September* 1714, to wit, on the 8d day of *July* 1824, it was corruptly, &c. agreed between the said defendant and the said *Thomas Dauncey*; that the said defendant should lend to the said *Thomas Dauncey* the sum of 100*l.* and should forbear and give day

In debt on the statute of *Ann.* to recover penalties for usury. The declaration averred, that "the defendant afterwards, to wit, on the 3d of *July* 1824, did lend, &c. to *T. D.*, and did forbear and give day of payment for the same to the said *T. D.* from the lending and advancing thereof until," &c. The money was proved to have been lent on the 5th of *July*: held that this

was a fatal variance: that the day though laid under a *videlicet* is material; that in an action for usury it must appear on the face of the record, that the period of forbearance is such, that the interest taken is more than the party is by law allowed to receive.

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of payment until the said bill of exchange should become due, to wit, until the 6th day of *October* then next following; and that for the forbearing and giving day of payment of the 100*l.* the defendant should receive from the said *Thomas Dauncey* the sum of 6*l.* 5*s.*; and that for securing the payment of the 100*l.* so to be lent, the said *Thomas Dauncey* should indorse and deliver to the said defendant the said bill of exchange," &c.

The declaration then averred, "that the defendant afterwards, *to wit, on the said 3d day of July 1824, did lend and advance* to the said *Thomas Dauncey* the said sum of 100*l.*, and *did forbear and give day of payment for the same* to the said *Thomas Dauncey, from the lending and advancing thereof, until the 6th day of October.* And that in further pursuance of the said corrupt bargain, the said defendant then and there, *to wit, on the said 3d day of July 1824, did take* from the said *Thomas Dauncey* the sum of 6*l.* 5*s.* *for the forbearing and giving day of payment thereof as aforesaid;* and that to secure the payment of the 100*l.* the said *Thomas Dauncey* in further pursuance, &c. indorsed the said bill of exchange. And the said plaintiff saith, that the sum of 6*l.* 5*s.* exceeds the rate of 5*l.* *per cent.*, contrary to the form of the statute," &c.

It appeared in evidence, that the defendant on the 5th of *July 1824, gave to Thomas Dauncey* a check on his banker for 98*l.* 15*s.*, dated the 3d of *July, 1824, and received* at the same time from *Dauncey* five pounds in notes.

Denman for the defendant contended, that this was a fatal variance; that it appeared in evidence that the money was not advanced until the 5th of *July*, the day the check was delivered to *Dauncey*, whereas in the declaration the time of forbearance is stated to be "from the lending and advancing thereof," which according to the declaration must be taken to be the 3d of *July*, and not the 5th as proved. If it is contended that the 3d of *July* is not to be taken as the day, because laid under a *videlicet*, then no day is laid in the declaration from which the defendant forbore; but the time being stated under a *videlicet*, cannot in this case make it immaterial, for unless the period of forbearance is stated, there is nothing upon the record to show, that an offence has been committed against the statute; if a day is material, the putting it under a *videlicet* will not make it immaterial; *Johnson v. Prickett*, 2 Saund. 291. b. 4th edit. It is also necessary on another ground that the time should be stated, *viz.* in order to protect the defendant against a second action for the same offence. The cases of *Carlisle v. Trears*, Cowp. 671. *Harris q. t. v. Hudson*, 4 Esp. N. P. C. 152. *Brooke q. t. v. Middleton*, 1 Campb. 445. are expressly in point.

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ABBOTT Ld. C. J. There is nothing in the last objection of the defendant's counsel, namely, that it is necessary that the time should be stated in order to protect a person against a second action for the same offence; that may always be done by proper averments. The force of the other objec-

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tion is, that it must appear on the face of the declaration; that the money paid for forbearance, is more than the proper rate of interest, and therefore it is material that a day should be stated. All the cases the defendant's counsel have cited as far as they go differ from the present; and this point therefore cannot be decided so much upon authority as upon principle. I am of opinion that you must, in a declaration for usury, show, on the face of the record, that the period of forbearance is such, that the sum taken for interest is more than the party by law is allowed to take; if in this case you omit altogether the 3d of *July*, then the only allegation on the record will be, that the forbearance is from the day of lending; still the 3d of *July*, notwithstanding the *videlicet*, must be considered as the day of lending, and that being so, I am of opinion the money having been proved to have been lent on the 5th, the variance is fatal.

Notice to a defendant to produce a check drawn by him and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the check remains in the banker's hands.

Notice had been given to the defendant to produce this check for 98*l.* 15*s.* Upon the non-production of which, the plaintiff's counsel proposed to give parol evidence of its contents.

Denman objected, as the check was in the custody of the banker; or, at all events, it had not been shown to have been delivered from the banker to the defendant.

ABBOTT Ld. C. J. I think the plaintiff has done enough to entitle him to give secondary evidence of its contents. Checks are generally returned to the customers; but if not, while in the hands of

the banker, they must be considered in the possession of the customer ; the banker is his agent.

Nonsuit.

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PARTRIDGE
q. t.
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COATES.

Scarlett and Abraham for the plaintiff.

Denman C. S., F. Pollock, and Holt for the defendant.

See Saunders' Rep. 1 vol. 295 a. 5th Edit.

ADAMS v. KELLY.

WESTMINSTER,
Dec. 14, 1824.

CASE for slander.

There were several counts in the declaration, stating the words in different ways, and the last count stated, "that the defendant did compose and publish, and cause and procure to be composed and published and inserted in a certain public newspaper, called the *Observer*, of and concerning the plaintiff, &c. the following false, &c. libel," and then set out with the usual *innuendos*, the paragraph inserted in the paper.

The words stated in the first count, were proved to have been spoken by the defendant, and the following evidence was offered in order to prove the last count of the declaration.

of such publication, and that the newspaper then produced was exactly the same, with the exception of one or two slight alterations, not affecting the sense: Held, that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant; but that the newspaper could not be read in evidence, without producing the written account delivered by the witness to the editor.

In order to show that a defendant had caused and procured a printed libel to be inserted in a newspaper; a reporter to a public newspaper proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose

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A witness (at that time a reporter for the *Observer* newspaper,) stated that he had met with the defendant, who communicated to him the slanderous matter set forth in the first count relating to the plaintiff, which the *defendant said would make a good case for the newspaper*. The reporter desirous of obtaining information for his paper, attended the defendant to an adjoining tavern, and who gave him a more detailed account, for the express purpose of inserting it in the paper with which the reporter was connected. Afterwards, from the particulars communicated by the defendant, the reporter drew up an account which he left at the office of the *Observer*, to be inserted in that paper.

An *Observer* newspaper was then put into the witness's hands, and he stated that a paragraph in that paper contained exactly the same account which he sent to the editor, with the exception of some slight alterations, not affecting the sense, made by the editor.

The counsel for the plaintiff then proposed to read the newspaper.

Gurney for the defendant objected to the newspaper being read; the written paper which the reporter sent to the editor, containing the account communicated to him by the defendant, must be produced; whether the printed paper is a copy of what the reporter has written, can only be seen by comparing them together.

ABBOTT Ld. C. J. This newspaper is proposed to be given in evidence, in order to sustain that

count, which charges the defendant with publishing the printed libel set forth in the declaration. The evidence is, that the reporter put something in writing from his conversation with the defendant, and which he gave to the editor. What the reporter published in consequence of what passed with the defendant, may be considered as published by the defendant; but you must show that what was published is that which was given to the editor by the reporter, which you can only do by producing the paper itself.

Verdict for the plaintiff, damages 20*l*.

Scarlett and *Talfourd* for the plaintiff.

Gurney and *Dowling* for the defendant.

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THE APOTHECARIES COMPANY v. BENTLEY.

WESTMINSTER,
Dec. 17, 1824.

THIS was an action for a penalty on the statute 55 Geo. 3. c. 194. for practising as an apothecary without having obtained the certificate required by that act.

All the counts of the declaration contained the allegation, that the defendant did act and practise as an apothecary, &c. "*without having obtained such certificate as by the said act is required.*"

No evidence was offered by the plaintiffs to show the defendant had not obtained his certificate.

The plaintiffs having closed their case, *Brougham*

Averment in a declaration on the 55 G. 3. c. 194. that defendant practised as an apothecary "*without having obtained such certificate as by the said act is required.*" Held that the *onus probandi* that the defendant had obtained his certificate lay with him and not with the plaintiffs.

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for the defendant submitted, that there must be a nonsuit, the plaintiffs have in all the counts alleged, that defendant practised as an apothecary without having obtained his certificate, and they must prove their allegation. The distinction he conceived was this, that where an exception was created by a distinct clause, the burthen of showing that he was within it lay upon the defendant; but here the exception was introduced to qualify the penal clause in its very body, the negative therefore must be both stated and proved by the plaintiffs.

Scarlett admitted, that where an exception is introduced in the same clause, it ought to be negatived in pleading; but denied the necessity of proving it, and instanced as exactly in point, the case of convictions against unqualified persons for sporting, in which every possible qualification must be negatived, and in which the proof of qualification is nevertheless cast on the defendants; and he cited as in point *Rex v. Turner*, 5 M. & S. 206.

ABBOTT Ld. C. J. I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative, the plaintiffs are not bound to prove it; but that it rests with the defendant to establish his having a certificate.

Verdict for the plaintiffs 20l.

Scarlett, Gurney, and Campbell for the plaintiffs.
Brougham and Platt for the defendant.

See the cases on this subject collected in Starkie's Evidence, Part 3. p. 376. n. (c), and Part 4. p. 627. In *Rex v. Smith*,

§ Burr. 1475, which was a conviction for trading as a hawkker and pedlar without a license, it was held that the *onus* of proving the licence lay on the defendant.

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GILLON v. BODDINGTON.

WESTMINSTER,
Dec. 18, 1824.

CASE.

This action was brought against the defendant as treasurer of the *London Dock Company*, to recover a compensation in damages for an injury to the plaintiff's reversion, in one third part of a certain wharf, called *Downe's Wharf*, occasioned by certain works carried on by the *London Dock Company* adjoining to the said wharf.

It appeared in evidence, that one undivided third part of *Downe's Wharf* had been devised to the plaintiff's father for life, with remainder to the son in fee, and that the plaintiff's title to the premises did not accrue until the death of his father in April 1823.

It was proved, that the *London Dock Company* in deepening the foundation of a dock immediately adjoining *Downe's Wharf*, had undermined a wall belonging to the wharf, so that every tide that brought water into the dock upon its return washed away some of the materials of the wall along with it, and that the injury arising from this was so great, that in the opinion of the surveyors, called on the part of the plaintiff who had seen the state of

The *London Dock act 39 & 40 G.3. c.47. s.151.* enacts, that no action shall be commenced against any person for any thing done in pursuance of that act after six calendar months next after the fact committed. The *London Dock Company* had, two years before the commencement of this action, undermined the wall of a wharf in one undivided third part of which the plaintiff's father then had a life-interest, with remainder to his son in fee. In consequence of this undermining the wall fell, but after the

plaintiff's title accrued: Held, that the son might maintain this action, although the wall was undermined during the life-time of the father: Held, that the action having been brought within six months after the falling of the wall was sufficient.

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the wall in *November* 1822, it was impossible that it should stand for any length of time.

It was proved, that part of the wall fell in 1824, in consequence of being undermined in the manner that has been stated by the works carried on by the Dock Company.

Thomas Grey and *William Fletcher* were proved to be the tenants in possession.

Scarlett for the defendant submitted, that the plaintiff must be nonsuited. The declaration states, "that the plaintiff now is, and at and during the several times when the wall hereinafter mentioned was kept and continued, and permitted and suffered to be, remain, and continue so undermined, shaken, and damaged and injured; and the soil under the same so shaken, loosed, and washed away; and the hereinafter parts of the wall fell down, and the remainder thereof became and was in such a tottering, ruinous, and dangerous state as hereinafter mentioned, was seised in his demesne as of fee of and in the reversion of one undivided third part of the wharf, with the appurtenances hereinafter mentioned, subject to a certain tenancy; that is to say, a tenancy from year to year of *Thomas Grey* and *William Fletcher*." The defendant therefore declares, not for any injury done to his remainder expectant on the determination of his father's tenancy for life, but he declares for an injury done to himself after he became possessed of the reversion, subject only to the tenancy of his tenants *Thomas Grey* and *William Fletcher*. Now the evidence clearly is, that the injury was done in his father's

life-time, and I take it to be perfectly clear, that if the father could have maintained this action the son could not. If then the father had brought this action and could have established the fact, that the works of the Company at the period of *November 1822*, had produced such an effect on that wall that the whole must be taken down, he could clearly have maintained this action, and I apprehend such an action cannot descend to his heir. The son can maintain no action, except for some injury done to his reversion after he became possessed of it. The evidence here is, that all the injury was done before. Another ground on which the plaintiff must be nonsuited is, that by the *London Dock act, 39 & 40 G. 3. c. 47. s. 151.* it is enacted, that no action shall be commenced against any person for any thing done in pursuance of this act after six calendar months next after the fact committed. Now it is clear, according to the evidence in this case, that the act was done in 1822, and consequently the action is not commenced as the statute provides within the six months.

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The *Attorney-General* in answer to the second objection, stated that it had been decided in *Roberts v. Read*, 16 East, 215. that where an action is brought for consequential damages, arising from an act done, the period within which the action is to be brought is not to be calculated from the doing the act, but is to be calculated from the period when the consequential damage has been occasioned, which is the foundation of the action. The first objection he contended was open to exactly the same answer as he had given to the se-

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cond; the action is founded on the consequential damage, *viz.* the necessity of rebuilding this wall, and the expence of doing it, which arose after the time that the plaintiff's title accrued, and within six months of that period the present action had been commenced. *Sutton v. Clarke*, 1 Marsh, 437. S. C. 6 Taunt. 29.

Scarlett in reply. The correct distinction has not been made between the cases; where there is a continuing damage, then the party is not bound to bring his action merely when the damage began, but here is a case where the event is ascertained and the consequence is predicted; the damage was not only done, but ascertained before the plaintiff's title accrued.

ABBOTT Ld. C. J. I am of opinion that the case of *Roberts v. Read* is an answer in point of authority to the objection which has been taken upon the act of parliament, and I cannot forbear saying, that I have great pleasure in finding such a decision in the books; for it appears to me to be one in which the wisdom of the common law has been interposed to prevent the injustice which might arise from too literal an adherence to the words of an act of parliament. In respect of the first objection, I also consider this case as a decided authority, and I agree with the *Attorney-General* that the principle there established is strictly applicable to the first objection. I take the facts in this case to be, that in the life-time of the father, not only an excavation had been made by the *London Dock Company*, but that the first consequence

of that excavation, *viz.* the washing away of the soil from under the wall by the water of the river had taken place; but the wall did not fall until after his death. For the expence of rebuilding that wall, notwithstanding the alteration of title by the death of the father, I am of opinion that the son may maintain this action.

Verdict for the plaintiff, damages 500*l.*

The *Attorney-General*, *Taunton*, and *R. Bayly* for the plaintiff.

Scarlett, *Harrison*, *Bosanquet* Serj., *F. Pollock*, and *Carter* for the defendant.

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BODDINGTON.

FOOTE v. HAYNE.

WESTMINSTER,
Dec. 21. 1824.

THIS was an action for breach of promise of marriage.

It was opened by the plaintiff's counsel that he should prove that the defendant had on the *Saturday* preceding the *Monday* which he had fixed for the marriage taking place, sent and retained Mr. *Scarlett* as his counsel, in anticipation as was suggested, of any future action that might be brought for the non-fulfilment of a promise, which he then had it in his contemplation not to perform.

In order to prove the delivery of the retainer, and the entry in Mr. *Scarlett's* book, his clerk had been served with a *subpœna duces tecum*.

The plaintiff's counsel having put some ques-

The retainer of a counsel for a cause is in the nature of a privileged communication, and cannot be disclosed.

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tions to a witness as introductory to calling Mr. *Scarlett's* clerk,

ABBOTT Ld. C. J. interposed. From what has been stated in the opening of the plaintiff's counsel, and from the questions now put to one of the witnesses, it appears to be the plaintiff's intention to prove that Mr. *Scarlett* was retained by the defendant, at the period mentioned by the plaintiff's counsel. I am of opinion that no communications with professional men relating to a cause can be disclosed, and I, therefore, shall not receive the evidence, considering this as a confidential communication. I thought it right to interpose myself; and not leave the objection to be taken by the counsel, being clearly of opinion, that this is strictly a confidential communication.

Verdict for the plaintiff, damages 3000*l*.

The *Attorney-General*, *Gurney* and *Platt* for the plaintiff.

Scarlett, *Brougham*, and *Adolphus* for the defendant.

WESTMINSTER,
Dec. 22. 1824.

REX v. PARKINS.

On a trial for a misdemeanour in K. B. a defendant is not entitled to the assistance of counsel to cross-examine witnesses when he reserves to himself the right of addressing the jury; but counsel may argue for him any point of law that arises, and suggest the questions to be put to the witness.

THIS was an indictment for perjury.

The defendant upon the jury being sworn applied to the Court to sit within the bar, as more

convenient for the purpose of addressing the jury, and conducting his case, and referred to the case of *Rex v. Thistlewood*; he also applied to the Court to allow his counsel to cross-examine the witnesses and argue points of law, reserving to himself the right of addressing the jury.

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 REX
 v.
 PARKING.

Scarlett, for the prosecution, stated that *Rex v. Thistlewood* was a trial at bar, and the defendant's proper place was at the bar.

ABBOTT Ld. C. J. The proper place for a defendant when he conducts his own cause is the floor of the court, and I cannot allow him to plead his own cause at the bar. The defendant's counsel may argue for him any points of law that arise; but I cannot, if he conducts his own cause, allow his counsel to cross-examine the witnesses for him.

After the examination in chief of the first witness for the prosecution,

C. F. Williams and *Langslow* applied to the Court for permission to cross-examine for the defendant, the defendant still reserving to himself the right of addressing the jury, and they cited as an authority the case of *Redhead Yorke*, tried at the *York Assizes*, 1795, before Mr. Justice ROOKE, when such a course was adopted, and contended that *Rex v. White*, 3 Campb. 98. was incorrectly reported, that the point there decided was that the defendant's counsel should not be allowed to cross-examine witnesses for him, if he likewise put questions himself and afterwards addressed the jury, but that case did not decide that the whole of the

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 v.
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examination might not be conducted by the defendant's counsel.

Scarlett, for the prosecution, objected to this course, and stated that he was present at the trial of *Redhead Yorke*; *Mr. Hotham* appeared as counsel for the defendant, and cross-examined the witnesses, and argued points of law. Upon the close of the case for the prosecution, the defendant himself rose to address the jury, and, after much discussion, was allowed to proceed. This course was much canvassed at the time, and disapproved of generally at the bar, and only permitted by the judge from the peculiar circumstance of the case. (a)

ABBOTT Ld. C. J. I have never known an instance where counsel have been permitted to adopt the course contended for on behalf of the defendant, and I think, if allowed, it would lead to great inconvenience. I shall permit the counsel to sug-

(a) It appears in the report of this case in the *State Trials*, vol. xxv. p. 1021. that at the close of the opening by the counsel for the prosecution, *Mr. Yorke* applied to *Rooke J.* to learn whether both his counsel and himself might not address the jury. He was informed by the learned Judge that both could not, and that he must make his election. It also states that *Mr. Yorke* applied to be permitted, when his counsel examined the witnesses, to examine them himself also, which was refused; that the cause then proceeded, and *Mr. Yorke* and *Mr. Hotham* his counsel alternately cross-examined the witnesses for the prosecution. On the close of the case for the prosecution, the learned Judge asked *Mr. Yorke* whether he had determined to address the jury himself or leave it to his counsel. *Mr. Yorke* addressed the jury, and *Mr. Hotham* and himself examined the witnesses called for the defence.

gest from their wisdom and experience, any question they may think it advisable for the defendant to put to the witnesses, and to argue for the defendant any points of law that may arise; and I will allow the defendant to sit within the bar while he cross-examines the witnesses, that his counsel may suggest questions, but when he addresses the jury he must return to the floor of the court.

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 }
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Not Guilty.

Scarlett, Adolphus, C. Phillips, and Quin for the prosecution.

Defendant in person, and *C. F. Williams, and Langlow*, as counsel.

DARTNALL v. HOWARD, and Another.

WESTMINSTER,
 Dec. 25, 1824.

ASSUMPSIT. Plea general issue.

The defendants had been employed by the plaintiff to lay out the sum of 1400*l.* on annuity, and this action was brought to recover a compensation in damages, for their having laid out such money upon insufficient security.

In order to show the defendants' admission of the insolvency of a surety in the annuity deed, the plaintiff proposed to read an examined copy of an answer in Chancery by the defendant *Howard*, to a bill filed against him previous to the granting of the present annuity, by persons not parties to the present action.

An examined copy of an answer in chancery, may be identified by a witness who has seen the hand-writing of the defendant to the original, although the original document is not produced at the time that he speaks to his belief of the defendant's signature to it.

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and another.

In order to identify the original answer of which, this purported to be an examined copy as the answer of this defendant, a witness was called who said he had examined this original answer, and that it was signed by the defendant, with whose hand-writing he was acquainted.

Gurney for the defendants contended, 1st, that an examined copy of an answer was not evidence in this case, but that the original should have been produced. 2dly, that the opinion of a witness as to the hand-writing of a person to a document which was not produced, could not be received.

Scarlett. Since the case of *Lady Dartmouth v. Roberts*, 16 East, 334., it is clearly settled that an examined copy of an answer in Chancery is admissible in evidence, although offered in a cause between different parties. The only excepted cases are forgery and perjury. As to the second objection, he contended that *Hennell v. Lyon*, 1 B. & A. 182. was an implied authority for putting such a question to establish the identity of the defendant.

Gurney, in reply, admitted that he could not, since the case of *Lady Dartmouth v. Roberts*, sustain his first objection, but relied upon the second.

ABBOTT Ld. C. J. I am of opinion that I ought to allow the question to be put to the witness, and I think the case of *Hennell v. Lyon* is an authority for so doing. Both my Lord ELLENBOROUGH and Mr. Justice HOLROYD, in that case appear to have

thought, that the original answer itself would be evidence without proving the hand-writing of the defendant. The evidence here offered I think must be received, the object of which is by proof of the defendant's hand-writing to identify the answer, and show that the examined copy of the answer put in, was the answer of the same defendant *Howard*.

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and another.

The plaintiff was Nonsuited.

Scarlett, Tindal, and Abraham for the plaintiff.
Gurney for the defendants.

A rule *nisi* for a new trial has been granted on other grounds, and is now pending.

REX v. BELLAMY.

WESTMINSTER,
Dec. 24, 1824.

THIS was an indictment for perjury in giving evidence on the trial of an indictment for an assault, at the sessions for the County of *Middlesex*.

An indictment for perjury in setting out the record of a conviction at the *Middlesex* sessions, stated an adjournment to have been made by Const, Esq. and A.B.C. & D. and others their fellows, &c. justices. An examined copy of the record of conviction when produced, stated the adjournment to have been made by Const, Esq. and E.F.G. and others, &c.: Held, that this defect might be cured by parol evidence of an adjournment made by the persons named in the indictment: Held, that no such evidence being given, the variance was fatal. *Semble*. A minute-book in which an entry of the proceedings at sessions are made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence as a proof of the fact there stated.

The indictment in setting out the record of conviction for the assault, stated an adjournment to have been made by Const. Esq. and A. B. C. & D., and others their fellows, justices of our said lord the king, assigned, &c.

The examined copy of the record of conviction

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when produced in evidence, stated the adjournment to have been made *by Const, Esq. and E.F.G.*, and others their fellows, justices, &c.

Denman, for the defendant, contended that this was a fatal variance.

C. F. Williams, for the prosecution, admitted the objection was fatal, unless he should be able to show that the parties stated in the record of conviction, as set forth in this indictment, were really present at the sessions; and he proposed to give evidence to that effect.

ABBOTT Ld. C. J. But must not their presence be verified by some record? and does not the record when produced vary from the statement in the indictment? I shall not, however, stop the case here; you may proceed to prove that the justices stated in this indictment to have been present at the sessions were actually there.

In order to establish this fact, the following evidence was given.

A witness from the office of the Clerk of the Peace produced a minute book, which contained an entry, not drawn up in any formal manner, of the names of the particular justices, who were present at the day of adjournment mentioned in the indictment, and amongst whom were all the names mentioned in the indictment; these minutes were made by a clerk in the same office of the name of *Richards*, whose duty it appeared to be to attend at the quarter sessions, for the purpose of making

these entries at the time ; but *Richards* was not called as a witness, and there was no evidence to show whether he was present on the particular day, further then the entry itself. In the same book on the opposite page to the entry already stated, was another, drawn up by the witness who produced the book ; this was in the form of a record, and was, in fact, a summary of all the names of the justices attending upon the Quarter Sessions upon each day during the sessions, but it did not distinguish who was present upon any particular day ; amongst these names also was the justices mentioned in this indictment.

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The witness stated that this book was the official book for all entries, and that from the minutes contained in it a roll is made up, containing the records of the proceedings at sessions.

Denman contended, 1st, That this evidence was not admissible ; that the examined copy of the record of conviction had been put in, stating by whom the adjournment was made, and no evidence could be received to prove that other persons were present at the adjournment than those mentioned in that record ; and 2dly, supposing the counsel for the prosecution may produce evidence to supply the defect, and show that these persons were present, the evidence given is not sufficient for that purpose. There is no evidence that *Richards* made the entry in the book at the time stated, and no witness has been called to prove the justices stated by that minute to be present, were there on that day. It may be true that the records are made up from this minute book, but after the record is made up it could not be

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permitted in any case that the record should be contradicted or explained by these minutes.

C. F. Williams contended that this minute book was, in fact, the official record of the proceedings of sessions, and as such admissible as proof of the facts therein stated. That it being a record of the adjournment by the Court itself, it would be better evidence of the persons then present, than any proof by witnesses who could speak to the presence of the justices.

ABBOTT Ld. C. J. I yield very reluctantly to the objection which has been taken by the defendant's counsel: not but that I think it the imperative duty of counsel, in prosecutions of every description, to take advantage of every formal objection that may present itself; but the reluctance I feel arises from knowing that if there is any error in my judgment, there will be no future opportunity for setting it right. Upon the fullest consideration I can give this subject here, I am of opinion that the defect has not been legitimately remedied. The indictment states an adjournment by Mr. Const and others; the examined copy of the record of conviction produced, states only one of the persons named in the indictment, as present at the adjournment, and states three or four other names of persons not mentioned in the indictment. It was contended that although the record omitted these names, that it might be supplied by other evidence, and I thought it might; but the question is as to the sufficiency of the evidence. I do not think the minutes entered in this book by *Richards*

is a record, or in the nature of a record. Then follows on the next leaf that which is very much in the nature of a record, and it contains the names, amongst others, of those who are stated in this indictment to have been present at the adjournment. But the question is, admitting this book to be a record, how far the one record can be corrected by the other. Now this entry gives you the names of every person present at any day during the sessions, not the names of those present at any particular day, therefore this will not supply the defect; it does not point out the persons present on the particular day. The first entry being nothing in the nature of a record, you should have called some person who could have stated that he was present, and saw the justices named in the indictment present on the day in question.

1824.
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a
BELLAMY.

Not Guilty.

C. F. Williams, Prendergast, and Langslow for the prosecution.

Denman, C. S. and C. Phillips for the defendant.

ADJOURNED SITTINGS AFTER TERM IN LONDON.

CHARLETON v. COTESWORTH.

GUILDHALL,
Jan. 15, 1825.

ASSUMPSIT for work and labour, and wages, as master and commander of a certain ship; and the usual money counts.

owners of a ship, not mentioning *primage*, and the owners have received payments in respect of *primage* from the freighters: Held, that the master, by usage of trade, is entitled to such payments.

Where there is a written agreement between the master and

1825.
CHARLETON
v.
COTESWORTH.

This action was brought to recover the sum of 115*l.* the amount of *primage* due to the plaintiff as master and commander of the ship *Oporto*, on three several voyages from *London* to *Pernambuco*, and back again.

The plaintiff held the command of the ship under the following terms reduced into writing: "At 10*l.* per month wages, one-third of all passage monies, and the owners to find the cabin."

It was admitted that the defendant, as owner, had received in account, the amount of freight and *primage*, the sum not being stated in the admission.

The *primage* claimed was calculated at the rate of 5 per cent. on the freight, and the bills of lading all contained the words "with *primage* and average accustomed." The plaintiff had accounted with the defendant for the two first voyages without any charge for *primage*, but on being dismissed from the command of the ship he demanded *primage* for the three voyages.

The defence was that the special agreement between the parties excluded the plaintiff's claim. And several merchants and ship owners were called on both sides to prove the usage of trade with respect to *primage*; but no instance was spoken to in which *primage* had been paid or resisted, in the case of a specific agreement silent as to the claim of *primage*. The practice was stated to be, to have specific agreements for wages, &c. "in lieu of every thing." If there was no special agreement, the captain would be entitled to it. The amount of *primage* varied in different trades, from 1 to 10 or 15 per cent. on the freight; the general amount was stated to be 5 per cent.

ABBOTT Ld. C. J., in summing up to the jury observed; neither party has in this case proved that which he has attempted. The plaintiff undertook to prove that *primage*, if not excluded by special agreement, belongs to the master; the defendant that it is never paid unless stipulated for; in other words, that it is matter of distinct agreement. In ancient times *primage* was a small payment made by the merchant on the delivery of his goods, for the care and attention bestowed on them by the master. It was called *hat-money*, sometimes *pocket-money*. Originally it was of small importance, but in the progress of trade it may have become of greater magnitude, and may possibly have taken a different character. If any usage exists, it must bind the parties, but no distinct usage has been satisfactorily established.

1825.
CHARLETON
v.
COTESWORTH.

If applying your mercantile knowledge to a contract of this description, you think that by the usage of trade the master is entitled to *primage*, the plaintiff must have your verdict; if on the other hand you think that the agreement means that he is to receive that which is stipulated for, and no more, you will find for the defendant.

The jury, which was special, found for the plaintiff, for 46*l.*, being the *primage* claimed on the last voyage, at 5 per cent.

Gurney, and F. Pollock for the plaintiff.
Scarlett, and Brodrick for the defendant.



Primage and petilodmanage is due to the master and mariners for the use of his cables and ropes to discharge the

1825. goods, and to the mariners for unloading the vessel; it is commonly about 12d. per ton. *Molloy*, b. ii. c. 9. s. 5. See also *Abbott on Shipping*, p. 223. *Holt on Shipping*, p. 420. *Laws on Charter Parties*, p. 188.

CHARLETON
v.
COTTESWORTH.

GUILDHALL,
Jan. 15, 1825.

KILBY and Another v. WILSON.

The plaintiffs purchased by the order of T. and Co. of *Ryder*, to whom they were known as brokers, 110 bales of cotton. The contract was regularly entered in the plaintiff's books as a purchase and sale by brokers, and brokerage charged to both parties. Bought and sold notes were delivered, not disclosing the names of principals, but charging brokerage to both. T. and Co. and *Ryder* were not known to each other as

TROVER for divers bales of cotton.

The plaintiffs were brokers of the city of *London*, and in *November* 1823, were employed by *Tenbruggenhate*, and Co., *London*, merchants, to purchase for them a large quantity of cotton. The plaintiffs accordingly on the 13th of that month applied to *Ryder*, a merchant in the cotton trade, and agreed for the purchase of 110 bales of *Surat* cotton. The contract was regularly entered in their books thus:

" *London*, 13th *November*, 1823

" Bought by order, and for account of Messrs *Tenbruggenhate* and *Payne*, of Mr. *A. Ryder* T. 1823. 110 bales *Surat* cotton, 3 piles, *P. Swallow* at 6s. 8d. per pound. Prompt one month *B* kerage 1½ per cent.

(Signed.) " *Kilby* and *Carrol*.

And the sale *mutatis mutandis*, and broker charged both parties.

It was said *Ryder* for the cottons, and handed them over in his own name. Held that the plain-

The plaintiffs were known by *Ryder* to be brokers, but the names of *Tenbruggenhate* and Co. were not disclosed at the time of the purchase. The custom of the trade is not to deliver the cottons until paid for, and the plaintiffs had been in the habit of dealing with *Ryder* without disclosing the names of their principals. Bought and sold notes signed *Kilby and Carrol* were delivered to *Ryder* and to *Tenbruggenhate* and Co. respectively, charging brokerage to both, but not naming any principals to either; the words "by order and on account of T. and Co., and R.," respectively being omitted; in other respects the notes were copies of the entries in the books. On the 28th of November, Mr. *Tenbruggenhate* applied to the plaintiffs for the cottons, who paid *Ryder* for the amount, and received the *East India* Company's warrants for the cottons which were then in the company's warehouses. The plaintiffs on the next day, being Saturday, delivered the warrants to *Tenbruggenhate* and Co. and received their cheque for 1027l. 19s. 9d. the amount, with the charges. At the same time they delivered a bill of parcels as follows:

1825.
KILBY
and another
v.
WILSON.

" London, 13th November, 1823.

" Messrs. *Tenbruggenhate* and *Payne*,
Bought of *Kilby* and *Carrol*,
110 bales of Surat Cotton, 3d. per *Swallow*,
Lots, Marks, &c. and charged brokerage 5l. 3s. 8d."

The names of *Ryder* and *Tenbruggenhate & Co.* were not communicated to each other as connected with the transaction. *Tenbruggenhate* took the warrants to the defendant, and deposited them as a security to cover his acceptances for two bills of 500l. each, given to *Tenbruggenhate* and Co.

1825.
KILBY
and another
v.
WILSON.

In fact, *Tenbruggenhate's* only object in the whole transaction was to raise money and abscond, and on the evening of the 29th of *November*, being *Saturday*, he left this country for *Paris*, carrying with him the proceeds of large quantities of goods, obtained from other persons, and for which payment had been made on that day in cheques on *Tenbruggenhate* and Co.'s bankers. These cheques, and amongst them that given to the plaintiffs, were dishonoured. *Payne*, who drew the cheques, was altogether unconcerned in the frauds of his partner, and had been persuaded by him that there was money in their bankers' hands to the amount of 5000*l.* *Tenbruggenhate* and Co. were declared bankrupts, and the solicitor to the commission pursued *Tenbruggenhate* to *Paris*, and recovered from him, with other property, the defendant's acceptances. These were afterwards given up to the defendant by the assignees, of whom the plaintiff *Kilby* was one.

The defendant had sold the cottons before any demand was made by the plaintiffs, to secure himself for another advance made to *Tenbruggenhate* before the deposit of the warrants.

The action was resisted on the grounds that the plaintiffs had no property in the cottons, they having bought and sold as brokers; and it was contended that the sale to *Tenbruggenhate* and Co. if valid, vested the property in the assignees; and if it was invalid through fraud, the property remained in *Ryder*.

ABBOTT Ld. C.J. in summing up to the jury said, I am of opinion that upon this evidence the plaintiffs must be considered to have dealt

with both parties as principals; however improper it may have been in them as sworn brokers, I think that they are buyers of *Ryder*, and sellers to *Tenbruggenhate* and Co. on their own account; and the only question I think fit to leave to you is, whether or no *Tenbruggenhate* obtained the warrants from the plaintiffs with a pre-conceived design to raise money upon them and then abscond, without ever paying the plaintiffs. If you are of that opinion your verdict must be for the plaintiffs; in that case the partnership ought not to prevent the plaintiffs from recovering, for although the partner was himself deceived, and had no participation in the fraud, still no property could be vested in the partnership by such a transaction. If you think that *Tenbruggenhate* conceived the design of defrauding the plaintiffs after he had obtained possession of the warrants, then your verdict must be for the defendant.

1825.
KILBY
and another
v.
WILSON.

Verdict for the plaintiffs 1015*l*.

Scarlett, and *R. V. Richards* for the plaintiffs.
Marryatt, and *Chitty* for the defendant.

In *Hilary* Term following, *Marryatt* moved for a new trial, but the Court refused the rule.

See *Kemble v. Atkins*, 7 Taunt. 260. 1 B. Moore, 6. S. C. Holt. N. P. C. 427. S. C. *Ex parte Dyster*, 1 Merivale's Rep. 155. 2 Rose. B. C. 349. S. C. *Hayman v. Neale*, 2 Campb. 337. *Cumming v. Roebuck*, Holt, N. P. C. 172.

As to transactions vacated by fraud, see *Rapp v. Latham*, 2 B. & A. 795. *Earl of Bristol v. Wilmore*, 1 B. & C. 514. *Noble v. Adams*, 7 Taunt. 59.

TANNER v. BENNETT.

L.L.
825.

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was insured;
and the cap-
tain, *bond fide*,
sold her for
fire-wood;
but she might
have been re-
paired but for
the negligence
of the resi-
dent agents of
the owners:
Held, that the
underwriters
are not liable
for a total loss.
The jury find,
"that the ship
has sustained
a partial loss,
but to what
amount there
is no evi-
dence:" Held,
that the plain-
tiff is entitled
to a verdict,
with nominal
damages only.

ASSUMPSIT on a policy of insurance on the ship *Margaretta Elizabeth*, from *London* to *St. Thomas's*. The ship had arrived within two miles of *St. Tho-*

mas's, and was proceeding with a favourable wind towards the harbour, when about eight in the even- ing the wind shifted and drove her on some sunk rocks. She remained swinging on a rock for two hours; but being lightened by throwing part of her cargo overboard, she was, with the assistance of people from the shore, got off, and brought into the harbour. She was then moored, and the re- mainder of her cargo discharged in the course of a fortnight. The captain gave immediate inform- ation to the resident agents of the owners, and demanded a survey. At this time the island of *St. Thomas's* was in a state of great confusion, having been very recently given up to the Danes. She was never hove down, and the captain stated that he was unable to procure carpenters to repair her, or con- veniences for heaving her down. She was, how- ever, condemned, and the captain offered her for sale, but could get no bidder. He then, suspect- ing dishonesty in the local authorities, demanded a second survey, upon which she was again con- demned, and he was ordered to tow her out of the harbour, and ultimately he sold her piecemeal, for the purpose of fire-wood.

The witnesses stated that she must of neces- sity have received considerable damage from

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the straining whilst she swung on the rock, that they would not have trusted themselves in her for another voyage, unless she had been repaired or hove down, although she made no water whilst on the rock, nor afterwards in the harbour. It was impossible to estimate the amount of the damage without heaving her down. It was doubtful whether she might not have been hove down and repaired, but for the misconduct of the local authorities, and of the persons concerned in her management. There was contradictory evidence as to the conveniences for repairing ships at *St. Thomas's*.

1825.
TANNER
v.
BENNETT.

ABBOTT Ld. C. J. After desiring the jury to find specially in case they thought the ship might have been repaired, but for the situation of the place; or the want of good faith in the local authorities; said, that provided they were satisfied the accident had not occurred from the want of skill and ignorance of the captain, and that the ship had not at all events received her death wound; they were to consider whether the damage sustained might have been repaired, but for the negligence of the captain and the agents. If that were so the plaintiff could not recover for a total loss; and it would then be for them to find for a partial loss, if they thought that some damage had been sustained, and they had any means of estimating the extent of it.

The jury found "that the plaintiff had sustained a partial loss, but to what extent there was no evidence. And that the ship might have been repaired but for the negligence of the resident agents."

1825.
 TANNER
 v.
 BENNETT.

Upon this finding, *Scarlett* contended that the verdict must be entered for the defendant, that it was incumbent on the plaintiff to establish the damage actually sustained, and that not having done so he had failed in completing his case. He cited *Parkin v. Tunno*, 2 Campb. 59.

ABBOTT Ld. C.J. I think, I ought to direct the jury to find for the plaintiff, with nominal damages.
 Verdict for the plaintiff, damages 1s.

Marryatt, F. Pollock, and Abraham for the plaintiff.

Scarlett, Campbell, and J. Parke for the defendant.

GUILDHALL,
 Jan. 18, 1825.

HARVEY and Another, Assignees of BAULK and JOSEPH, Bankrupts, v. ARCHBOLD and Others.

Merchants in London agree with the defendants, British merchants residing at Gibraltar, to consign goods to them for sale upon a *del credere* commission; that the London

DETINET for goods, with the money counts in debt.

This action was brought to recover the proceeds of certain goods consigned for sale to the defendants by the bankrupts, under the following circumstances.

The defendants were *English* subjects, carrying on business at *Gibraltar*, and having no mercantile

correspondents of the defendants, on the consignment of the goods to the order of the defendants, shall on their account accept bills at ninety days, drawn by the consignors, for two-thirds the invoice price; that the defendants shall charge the amount of the bills in *Gibraltar* currency, with the exchange, and 6 per cent. interest from the dates. The consignors to be allowed 6 per cent. interest on balances in the hands of the defendants, that being legal interest at *Gibraltar*, and the usual mode of remitting from *Gibraltar* being by bills on London at ninety days: Held, that such agreement is not usurious.

establishment in this country. The bankrupts were merchants in *London*, and were in the habit of consigning goods to the defendants. As soon as the goods were shipped, the bills of lading were handed over to *Reid and Co.*, the *London* agents of the defendants, who had instructions to advance to the bankrupts to the amount of two-thirds of the invoice price. The advances were made by bills at 90 days, drawn by the bankrupts on *Reid and Co.*, who, instead of accepting, discounted the bills at 5 *per cent.* and paid the difference in cash. The defendants in their accounts with the bankrupts, all of which were kept in *Gibraltar* currency, debited them with the amount of the bills converted into *Gibraltar* currency, together with the exchange on the days of the dates; in other words, with the price at *Gibraltar* of such bills on *London*, and charged interest at 6 *per cent.* from the dates. The consignments were insured by *Reid and Co.* to cover these advances, and the expence charged by the defendants to the bankrupts. The defendants were allowed 7½ *per cent.*, *del credere* commission on the sales. The bankrupts were to have been allowed interest at 6 *per cent.* on balances in the hands of the defendants, had their speculations turned out successful, but, in fact, none of the consignments produced a profit.

Reid and Co. kept no accounts with the bankrupts, and the funds from which they made the advances consisted of remittances made by the defendants from *Gibraltar*. The terms on which these transactions were conducted had been agreed upon in *London*, between the bankrupts and *Johnson*, one of the defendants, and the ad-

1825.
 HARVEY
 and another
 v.
 ANSONES
 and others.

1825.
 HARVEY
 and another
 v.
 ARCHBOLD
 and others.

vances were not made by *Reid* and Co. until authorized by *Archbold*, who resided in *England*, but in other respects, took no active part in the business of the firm.

The usual mode of dealing between *Gibraltar* merchants and their *London* correspondents, is to remit by bills on *London*, at 90 days, and to charge these in *Gibraltar* currency, with the exchange, and 6 *per cent.* interest from the dates, that being legal interest at *Gibraltar*; $7\frac{1}{2}$ *per cent.* is the usual *del credere commission*.

It was doubtful on the evidence, whether it was part of the agreement between *Johnson* and the bankrupts, that *Reid* and Co. should discount the bills, as it was a rule of that house not to accept bills drawn on them in *London*.

The defendants had accounted for the proceeds of all the sales, provided they were allowed to retain for the advances so made, and interest. It was insisted for the plaintiffs that such advances were usurious loans, and that the defendants had no right to deduct for them.

ABBOTT Ld. C. J. The material question to be ascertained in the first place is, whether or no there be any usury in this case; and the point upon which I wish you to give me your opinion is, whether or no it was part of the agreement between *Johnson* and the bankrupts, that *Reid* and Co. should not accept and redeliver the bills, but should advance the amount in cash, *minus* the discount at 5 *per cent.* If you think so, I am of opinion that the transaction was unlawful; if that was no part of the bargain, then I think there was

no usury, and that your verdict must be for the defendants.

Verdict for the defendants.

The *Attorney-General*, *Wilde Serjt.*, and *Platt* for the plaintiffs.

Scarlett, *Campbell*, and *Crowder* for the defendants.

1825.
HARVEY
and another
v.
ARCHBOLD
and others.

In *Hilary* Term following, The *Attorney-General* moved for a new trial, but the Court refused a rule *nisi*, on the ground that the advances were anticipated payments and not loans; and that the whole must be taken as *Gibraltar* transactions. The Court gave no opinion on the right to retain from the proceeds, in case the agreement had been usurious.

See *Auriol v. Thomas*, 2 T. R. 52. *Bodily v. Bellamy*, 2 Burr. 1094. *Ekins v. E. I. Company*, 1 P. Wms. 395. *Dewar v. Span*, 3 T. R. 425. *Stapleton v. Conway*, 1 Ves. sen. 427. 3 Atk. 727.

BLOXAM and Another, Assignees of FOU DR I-
NIER and Another v. ELSIE.

GUILDHALL,
Jan. 19, 1825.

CASE for the infringement of a patent.

The original patent was taken out by an Englishman, for a new method of making paper, the invention of *Didot*, a Frenchman, and in trust for him. The title of the bankrupts was founded on an act of parliament, which vested the monopoly

The contents of a written instrument cannot be proved against a party by his declarations, unless the non-production of it be accounted for.

1825.
 BLOKAR
 and another
 v.
 FLORES.

for an enlarged term, in the bankrupts, they having, with the assistance of *Didot*, made considerable improvements in the machine.

In order to prove that *Didot* was in partnership with the bankrupts, *Scarlett* asked a witness whether he had not heard *Foudrinier*, before the bankruptcy say, that by a deed between them and *Didot*, an interest in the patent belonged to *Didot*; and he relied on the general rule of what a party says, being evidence against him.

This was objected to on the ground that no notice had been given to produce the instrument, nor evidence offered of its loss.

ABBOTT Ld. C. J. I am clearly of opinion that no question can be asked as to what *Foudrinier* has said of the contents of a written instrument without the production of the instrument, or an account of its non-production; and I give my opinion distinctly, in order that it may be reviewed by a bill of exceptions, or in any other mode that the counsel for the defendant may think proper.

Verdict for the plaintiffs. (a)

The *Attorney-General*, *Marryatt*, *Gurney*, *Curwood*, and *Tindal* for the plaintiffs.

Scarlett, *Brougham*, and *E. Alderson* for the defendant.

(a) A rule *nisi* for a new trial in this case upon other points is now pending; but the fact of *Didot's* partnership in the patent having been afterwards proved by other evidence, this decision forms no part of the rule.

1825.

SALMON v. BENSLEY.

GUTHRIE, J.
Jan. 20, 1825.

ACTION on the case for a nuisance in erecting and continuing a steam engine, near to plaintiff's dwelling-house.

In case for a nuisance, notice to remove the nuisance left at the premises is evidence against a subsequent occupier.

The plaintiff's counsel proposed to read a letter from the plaintiff to the person who had immediately preceded the defendant in the occupation of the premises, upon which the steam engine was erected, requiring him to remove the nuisance, and containing a notice of an intention to bring an action if it was continued. It was proved that this letter was delivered at the premises, and it was admitted that the defendant did not then reside there, and that he was not a partner of the previous occupier.

The *Attorney-General* objected to reading the letter, as the notice could not bind the defendant.

ABBOTT Ld. C. J. I am of opinion that a notice of this nature, delivered at the premises, to which it relates, to the occupier for the time being will bind a subsequent occupier, and that a person who takes premises upon which a nuisance exists, and continues it, takes them subject to all the restrictions imposed upon his predecessors by the receipt of such a notice.

Verdict for the plaintiff.

Gurney, Tindal, and J. Parke for the plaintiff.

The *Attorney-General*, *Scarlett*, *Brougham*, and *F. Pollock* for the defendant.

1825.

GUILDHALL,
Jan. 22, 1825.

The National BANK of SAINT CHARLES v.
DE BERNALES.

A foreign corporation may sue in this country by their corporate name. The plaintiffs sued by the name of "The National Bank of St. Charles." The name given by charter of the King of Spain, was "The Bank of St. Charles." Held no variance, the bank being in fact a national one.

ASSUMPSIT on several bills of exchange drawn by defendant, payable to the order of the Directors of the National Bank of St. Charles, and the money counts.

In order to prove the plaintiffs to be a corporation according to the laws of *Spain*, which his Lordship early in the cause said was necessary, according to the case of *The Dutch West India Company v. Van Moses*, 1 Strange, 612. S.C., Lord Raymond, 1532., an examined copy of a charter deposited in the proper public-office at *Madrid* was put in.

The charter was granted by *Charles 3d*, King of *Spain*, in the year 1784, and declared that the king, for the purposes of commerce and finance, thought fit to create, erect, and authorise a bank, which, so far as regarded its object and end, should be *national* and general for the kingdom of *Spain* and the *Indies*. Then followed different regulations, and amongst others, "that for the more effectually insuring the permanence of the bank, and the public confidence, it should have the denomination of *The Bank of Saint Charles*. That the capital should consist of 150,000 shares of specified amount, and the affairs be managed by eight directors, elected from time to time by the shareholders. That the bank should abide by the general system of the monarchy with respect to law-suits; so that when there may be a tribunal

of commerce, they should be heard therein, and when not, the justices should proceed with the appeals, in the manner prescribed by the laws; although the bank in the administration of justice, should be considered as the most privileged persons. Shares to be indorsed and assigned, both by individuals and fraternities in the same manner as bills of exchange."

1825.
The
National
BANK of St.
CHARLES
v.
DE BERNALES.

The defendant was the agent of the bank, residing in *London*, and his letters were put in addressed to "The Directors of the National Bank of *St. Charles*;" in which he acknowledged to have received several bills of exchange on account of the directors; and of these bills it was proved he received the proceeds on maturity, to the amount of 20,204*l*.

It was objected by *The Attorney-General*, that there was no proof of the plaintiffs' having a right to sue as a corporation in *Spain*; and that even if they had that right, they had sued by a wrong name.

Scarlett, in answer, relied on the case of *The Mayor and Burgesses of Stafford v. Bolton*, 1 B. & P. 40., and at all events that the misnomer could only be taken advantage of in plea in abatement, and that the bank was in fact national.

ABBOTT Ld. C. J. I feel no difficulty in this case, if the jury are of opinion that the national bank of *St. Charles*, is the same as the bank of *St. Charles*.

Verdict for the plaintiffs, damages 20,204*l*.

1825.

The
National
Bank of St.
Charles

v.

DR. BERNALDO.

Searlett, J. Parke, and Kaye for the plaintiff.
The Attorney-General, and Patteson for the de-
fendant.

As to the variance, see *Doe d. Malden v. Miller*, 1 B. & A. 699. *Croydon Hospital v. Farley*, 6 Taunt. 467. 1 Saunders's Rep. 340. a. 5th edit.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

MICHAELMAS TERM,

5 GEO. IV. 1824.

ADJOURNED SITTINGS AT WESTMINSTER.

WALLACE v. WOODGATE.

WESTMINSTER,
Dec. 5, 1824.

TROVER for three horses.

The defendant was a horse-dealer, and had sold the horses in question to the plaintiff, and had taken his bills of exchange in payment. The horses, after the sale, were kept at the defendant's livery stables, and there was evidence to show that the plaintiff had agreed with the defendant that they should remain with him until their keep was paid for. The plaintiff was in the habit of using the horses

out of his possession: Held, that the livery-stable keeper might, without force, retake the horses, and that the lien would revive.

A livery-stable keeper may, by express agreement, have a lien for the keep of horses; where the owner of horses in the possession of a livery-stable keeper who had such lien, fraudulently took them

1824.
WALLACE
v.
WOODGATE.

whilst they were kept by defendant, and one day under pretence of using them, took them entirely away to other stables. The defendant, finding out where they were kept, in the absence of the plaintiff, re-possessed himself of them ; upon which the plaintiff brought this action, and the defence was, that the defendant had a right to retain the horses until the keep was paid for, he having a *lien* by agreement.

BEST C. J., in summing up, told the jury that a livery-stable keeper had not, by law, a *lien* for the keep of horses, unless by special agreement with the owner of them ; and that if they were satisfied that there was an agreement to that effect, and that the plaintiff had removed the horses in order to defraud the defendant of his *lien*, their verdict must be for the defendant. That he had a right, without force, to retake the horses, and that being so re-possessed his *lien* revived.

Verdict for the defendant

Vaughan Serjt., and *Chitty* for the plaintiff.
Taddy Serjt. for the defendant.

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ADJOURNED SITTINGS IN LONDON.

SEAMAN *v.* PRICE.GUILDHALL,
Dec. 10, 1824.*ASSUMPSIT.*

The first count stated that plaintiff had bargained and agreed with one *J. E.* for the purchase of three freehold houses, to be conveyed to him, the said plaintiff, at the price of 600*l.*, and that in consideration the plaintiff would sell and give up to the said defendant, the said bargain, and would suffer and permit the said defendant to become the purchaser of the said houses from the said *J. E.* instead of him the said plaintiff; he, the said defendant, undertook, &c., to pay the said plaintiff for the said bargain the sum of 40*l.* That the plaintiff did sell and give up the said bargain to the said defendant, and did suffer and permit the said defendant to become the purchaser of the said houses from the said *J. E.*, and the said defendant did accordingly become such purchaser, and did take the said bargain, and did obtain a conveyance to him of the said houses on the terms aforesaid, &c.

The second count stated the consideration that the plaintiff would suffer, permit, and procure the defendant to become the purchaser, and averred that plaintiff did suffer, &c., and that defendant was accepted, and became the purchaser, &c.

The third count was substantially the same.

The last count stated the consideration that

The plaintiff had verbally agreed with *J. E.* for the purchase of certain houses; the defendant, in writing, agreed to give the plaintiff 40*l.* for his bargain, the houses were afterwards at plaintiff's request conveyed to the nominee of the defendant:

Held, that the transfer of the parol bargain was a sufficient consideration for the promise of the defendant.

Seemle, Conveyance to the defendant's nominee, supports an averment that, "the defendant became the purchaser."

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plaintiff would relinquish and give up the said bargain to the said defendant, and would give and afford to the defendant the opportunity of becoming the purchaser, and averred that plaintiff did relinquish, and give up, and did give and afford, &c.

It appeared in evidence that the plaintiff had verbally agreed with *Joel Emmanuel*, the owner of the houses, for the purchase of them at 600*l.*; and that the plaintiff had, in writing, agreed with defendant to sell him the bargain for 40*l.* Upon the request of the plaintiff, *J. E.* conveyed the premises, under the direction of the defendant, to a *Mrs. Price*. This conveyance was not in trust for the defendant. *J. E.* stated that he would not have conveyed to the person named by the defendant, but for the request of the plaintiff, to whom he held himself bound by his contract.

Upon this evidence it was objected by *Pell Serjt.* that the action was not sustained, on two grounds; 1st, that the bargain between plaintiff and *J. E.* not being in writing, was void under the statute of frauds, and therefore the transfer of it to the defendant, could form no good consideration for the defendant's promise, inasmuch as it could not be legally enforced against *J. E.*

2dly. That the averment of defendant's having become the purchaser was not proved, the legal conveyance being to *Mrs. Price*, who was not even a trustee for the defendant.

BEST C. J. I think that all the counts are substantially supported. Upon the first objection the plaintiff as against the defendant, has brought him-

self within the statute of frauds, the agreement on which he founds his action being in writing. If, indeed, *Emmanuel* had refused to convey, there might have been a valid defence to this action. But having derived all the advantage intended, the defendant cannot now be permitted to say that what he agreed for with the plaintiff was of no value. As to the second objection, the defendant *has*, in substance, become the purchaser of the premises. He *has* had the entire benefit of the bargain by the conveyance to his nominee procured for him through the means of the plaintiff. But I will give leave to move to enter a nonsuit.

Verdict accordingly.

Vaughan Serjt., and *Talfourd* for the plaintiff.

Pell Serjt., and *Barstow* for the defendant.

In *Hilary* Term following, *Pell* Serjt. moved for a rule to show cause why a nonsuit should not be entered on the grounds urged at the trial, but the Court refused the rule; and in giving judgment, *BEST C. J.* said,

The inclination of my opinion at the trial was as it is now, that all the counts of this declaration are supported; but it is unnecessary to decide that now, as the last count is clearly proved. Beyond all question the defendant has had the opportunity of becoming the purchaser, the premises having been conveyed to his nominee; and though there was no legal obligation on *Emmanuel* to convey, yet the defendant has in fact, enjoyed all the ad-

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vantages of this agreement, and that forms a moral obligation sufficient to support the promise.

The other Judges concurred.

GUILDHALL,
Dec. 15, 1824.

DOKER, Executor of DOKER v. HASLER,
Sheriff of Sussex.

A widow cannot be asked to disclose conversations between herself and her late husband.

ACTION for a false return to a *fi. fa.*

The defence was that the execution was fraudulently taken out in order to protect the goods of the debtor against his assignees, under a commission of bankrupt. In order to prove this, the widow of the testator was called and asked to a conversation between herself and the testator. This was objected to on the authority of *Munroe v. Twisleton*. *Peake on Evidence*, Appendix, 44.

BEST C. J. I remember that in that case, in which I was counsel, Lord ALVANLEY refused to allow a woman, after a divorce, to speak to conversations which had passed between herself and her husband, during the existence of the marriage. I am satisfied with the propriety of that decision, and I think that the happiness of the marriage state requires that the confidence between man and wife should be kept for ever inviolable. The point is of very great importance, and I will reject the evidence, in order that the question may

receive a solemn discussion in case my present opinion should be thought unfounded.

Verdict for the defendant.

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DOKEB

v.

HASLER.

Vaughan Serjt. and *Comyn* for the plaintiff.

Pell and *Wilde* Serjts. for the defendant.

COX and Others v. REID and Another.

GUILDHALL,
Dec. 21, 1824.

ASSUMPSIT for work and labour, goods sold and delivered.

This action was brought to recover the value of certain copper, furnished by the plaintiffs for the repair of the ship *Asia*.

The copper was delivered in *December*, 1817, whilst the ship was lying in the docks of Messrs. *Fletcher* and Co., who were employed to repair her. In order to charge the defendants, the plaintiffs proved an indorsement on the ship's register at the port of *Newcastle*, showing a transfer to the defendants, dated the 24th *November*, 1817, from *R. and T. Bulmer*, the owners on the registry; and a re-transfer from the defendants to *R. and T. Bulmer*, dated the 9th *October* 1818. This bill of sale from the *Bulmers* to the defendants, which was unconditional, was also put in. *Joseph Bulmer* had the management of the ship during the time when the goods were supplied.

Registered ownership is *prima facie* evidence of liability for the repairs of a ship; but may be rebutted by showing the credit not to have been given to the owners. A deed of defeasance, making void an absolute bill of sale, upon payment of a certain sum of money, is admissible for the defendants to show the purposes of their ownership; the bill of sale being duly entered on the registry, without mention of the defeasance.

Vaughan Serjt. relied on the *prima facie* liability of the defendants arising from the registered

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 {
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 v.
 R. and T.

ownership, and referred to the action brought by *Fletcher* and Co. against these defendants, for the repairs of the same ship, and in which they had obtained a verdict, coram Lord GIFFORD C. J.

For the defendants it was contended that the credit was in fact given to *Bulmer*, and the case of *Jennings v. Griffiths*, supra, p. 42., was relied on; and it was proved that *Joseph Bulmer* had had the entire control of the ship and her concerns, and had in every respect appeared to the world as owner; that he had appointed the captain, he had given the plaintiffs the order for the copper, and that he and the plaintiffs had other transactions; and the following account given by plaintiffs to Messrs. *Bulmer* and Co. was produced.

Limehouse, 1819.

Messrs. *R. and T. Bulmer*, Drs.

To Cox and Co.

Sept. 21. — To amount of copper account for supplies to the ship <i>Asia</i> , as per bill	635 <i>l</i> .
Nov. 14. — Cr. by amount of account for copper received for brig <i>Claremont</i> , as per bill	347 <i>l</i> .
Balance in favour of Cox and Co.	388 <i>l</i> .
Credit 12 months, bill at 3 months.	

The defendants were bankers at *Newcastle*; and a defeasance to the bill of sale of 24th of *November*, 1817, of the same date, making void the same on payment of 7000*l*. by Messrs. *Bulmer* to the defendants, was offered.

This was objected to on the ground that the plaintiffs were no parties to it, and that it was void

under the registry acts. But his Lordship said, that as it was attempted to charge the defendants, not in respect of their possession, but on account of their ownership of the vessel, it was clearly admissible for them to show the nature of that ownership, and the real situation in which they stood.

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BEST C. J. in summing up said, I entirely concur in the law as laid down in the case referred to by my brother *Pell*, and the only question for you to decide is, "upon whose credit were these goods furnished." It is true that the registered owner of a ship is *prima facie* liable for repairs, because it must be presumed that work from which he derives a benefit was done with his privity. But it is for you to say whether that presumption is not met by the facts of this case, for you find that throughout these transactions the defendants do not in any way appear. The plaintiffs deal with the *Bulmers*, and with them only, and the account before you is strong to show that they looked to them for payment. The registry acts grew out of public policy, but they have been used to fetter and incumber the property in ships to an extent quite foreign to the intentions of the legislature. Under those acts the defeasance is void as far as it affects the property in the ship, and it cannot at all alter the legal or equitable title of the defendants. But it is important for you to look at it, in order to see the purpose for which the defendants were owners. It is for you to say "whether or no those goods were furnished upon the credit of the defendants."

Verdict for the defendants.

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Vaughan and Bosanquet Serjts., and D. F. Jones
for the plaintiff.

Pell Serjt. Tindal and Holt for the defendant. (a)

(a) The case of *Fletcher and another v. Reid and another*, was tried at the *London* sittings after *Hilary* term, 1824.

The plaintiffs rested their case on the admissions of the defendants, which stated that the plaintiffs had done certain necessary repairs to the ship *Asia*, to the amount of 540*l.*, and had made out their bill for the same to the captain and owners, and sent it to *Bulmer*; that during the time of doing these repairs the defendants were registered owners, that is to say, from *November* 1817 to *October* 1818.

Lord GIFFORD C.J., after objection by *Taddy Serj.*, decided that the admission of necessary repairs having been done to a ship, of which the defendants were legal owners, was sufficient to call on them for an answer.

Taddy Serj. then went into his case and showed, that *Bulmer* had conducted the affairs of the ship, and had given the orders, but failed in proving that the defendants were merely mortgagees, and the question was left to the jury, whether the plaintiffs had dealt with *Bulmer* as the agent of the owners, or had given him credit on his own account, and the jury found for the plaintiffs.

Vaughan, and *Bosanquet Serjts.*, and *D. F. Jones* for the plaintiffs.

Taddy Serj. and *Tindal* for the defendants.

By 4 *Geo. 4. c. 41.* the former registry acts are repealed, and the law consolidated in that act, and s. 43. provides, that all transfers of ships, or shares by way of mortgage, or in trust for sale for the payment of debts, shall be registered as such, and that such mortgagees or trustees "shall not be deemed to be the owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred available by sale or otherwise, for the payment of the debt or debts, for securing the payment of which such transfer shall have been made."

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS IN AND AFTER

HILARY TERM,

5 & 6 GEO. IV. 1825.

FIRST SITTING IN TERM IN LONDON.

MINTYRE *v.* LAYARD, Esq.

GUILDHALL,
Jan. 31, 1825.

TRESPASS and false imprisonment.

Two rules had been made by the Court from which this record issued, as to the examination of witnesses on behalf of the plaintiff and defendant upon interrogatories.

defendant, with liberty to each to exhibit cross interrogatories; and one of the rules ordered, that the interrogatories, depositions, &c. so taken, should be admitted, read, and given in evidence at the trial of the cause, *saving all just exceptions*. *Semble*, That the plaintiff is entitled to make use of answers to interrogatories which had been exhibited on behalf of the defendant, although the plaintiff had not examined such witnesses on cross interrogatories: Held, that if the plaintiff reads the answers to interrogatories put by the defendant, he cannot object to the admissibility of some of the answers, because they referred to written documents which were not produced.

Rules of court had been obtained for examining witness on interrogatories by both the plaintiff and de-

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v.
LAYARD.

By the first of these rules it was ordered that the trial of the issue in this cause should be postponed until the sittings after the next term, “ the plaintiff hereby consenting that the defendant shall examine his witnesses, who are abroad, upon interrogatories, and that their depositions may be read at the trial in case of their absence. And the defendant consenting that the plaintiff’s witnesses who are going abroad may be examined upon interrogatories, and that their depositions may be read at the trial in case of their absence. And that each party be at liberty to cross-examine upon interrogatories, and that their depositions may be read at the trial in case of their absence ; and that the clerk of the rules and orders of this Court do draw up a rule or rules of their examination upon the production of counsel’s hand for that purpose.”

By the second rule it was ordered “ that the defendant be at liberty to examine *de bene esse*, such of his witnesses who are residing at the island of *Malta*, upon interrogatories to be exhibited to them before *W. R.* and *H. T.*, commissioners named on the part of the defendant, and *E. F.* and *E. N.*, commissioners on the part of the plaintiff. And that the plaintiff be at liberty to exhibit cross interrogatories for the examination of the said witnesses, and for that purpose notice of the time and place of the said examination be given to the plaintiff’s agent or other representative there.” And it is also ordered that the said interrogatories, depositions, and cross-examinations, taken in manner aforesaid, be transferred under the seal of the said com-

“missioners to *Charles Short*, Esq., clerk of the
 “rules and orders of this Court on the plea side
 “thereof, and be admitted to be read and given in
 “evidence at the trial of this cause, saving all just
 “exceptions.”

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The plaintiff's counsel having called the clerk of the rules, who produced the original rules, together with the interrogatories and depositions annexed, proposed to read the answers of witnesses examined on interrogatories on behalf of the defendant, and who had not been examined under cross interrogatories exhibited by the plaintiff.

The *Attorney-General*, for the defendant, contended that the plaintiff was not entitled to make use of these answers to interrogatories which had been exhibited on behalf of his client, but it was for the defendant to make use of them or not, as he thought fit; to allow the plaintiff to read these answers would place him in regard to his witnesses in a different situation from that which he stands in any case where the witness is called, and would be in effect to allow him to cross-examine his own witness.

Brougham contended, that it was like the case where the one side calls a witness, who proves facts which makes it unnecessary for the other side to prove them, and whom otherwise they must have examined in chief, and cross interrogatories are always in the nature of examinations in chief; because at the time you put them, you do not know the interrogatories of the other side, the only dis-

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inction between the two being that where you put cross interrogatories you may put leading questions.

ABBOTT Ld. C. J. received the evidence without expressing any opinion as to its admissibility, giving the defendant leave to move.

Upon the interrogatories and answers being read,

Brougham objected to some of the answers being received in evidence, as they referred to what was in writing, and which writing was not produced. The rule contains a saving of all just exceptions, which is to guard against the admission of what is not strictly legal evidence.

ABBOTT Ld. C. J. If you take upon yourself to use these examinations of witnesses, I must consider you as the party putting the questions, and you must take the answers for better or worse.

Verdict for the plaintiff, damages 200*l*.

Brougham and *Chitty* for the plaintiff.

The *Attorney-General*, *Raine*, *Gurney*, *J. Parke* and *Shepherd* for the defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

CLARK v. HUME.

WESTMINSTER,
Feb. 15, 1825.

COVENANT by the assignee of lessor against the assignee of lessee.

Plea, that the estate, right, title, &c. of the lessee did not vest in the defendant by assignment in manner and form, &c. Issue thereon.

The premises in question were demised by indenture of lease dated 30th *March* 1818, for the term of 67 years, at the rent of 68*l.* a-year to *William Hassen*, who covenanted for himself, his executors, administrators, and assigns, for the payment of the rent, at the four usual feasts, &c.

Hassen took possession of the premises under the lease, and carried on the business of a brass founder thereon. In *November*, 1823, he became a bankrupt, and on the 15th of that month the defendant was chosen assignee. At the time of the bankruptcy there was a considerable portion of rent in arrear, and the plaintiff having threatened the bankrupt with a distress, he applied to the defendant, who, on the 8th of *December* 1823, wrote to the plaintiff the following letter : —

“ Sir,

“ I beg you will stay taking any distress out against the tools and effects belonging to the estate of *William Hassen*, of No. 2., *Norfolk Street*, your tenant. I will now engage with you that your situation shall not be worse than it has

The assignee of a bankrupt, lessee of certain premises, chosen on 15th *Nov.* 1823, kept the bankrupt in the premises, carrying on the business for the benefit of the creditors until *April* following, and himself occasionally superintended. But on the 23d *Dec.* 1823, disclaimed the lease by letter to the landlord: Held, that the assignee, notwithstanding such disclaimer, had elected to accept the lease by using the premises for the benefit of the creditors.

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been, with respect to your demand for rent, until I have the pleasure of seeing you, to come to an arrangement."

At this time the bankrupt continued in possession, conducting the business in the same mode as before the bankruptcy, finishing old orders, and taking new ones. The defendant came to inspect the business generally twice a week, and furnished the bankrupt with money, for the purposes of the business; the bankrupt kept the accounts, and transmitted the books every week to the defendant. This continued up to the month of *April 1823*. On the *22d December 1823*, the defendant wrote to the plaintiff, announcing his intention, as assignee of the bankrupt, not to accept the lease of the premises, and on the *25th of March* delivered the lease to the plaintiff, who received it, but after consulting his attorney, returned it to the defendant.

ABBOTT Ld. C. J. in summing up said, the single question for you to decide is whether or no the estate in these premises vested in the defendant. Now by the assignment of all the estate and effects of the bankrupt to the defendant, the term in question would, by operation of law, vest also, provided the assignee acquiesces in the vesting of the estate. But in order that the creditors of a bankrupt may not be burthened with a lease which so far from being valuable would be a charge to the creditors, the law has provided that the assignee may dissent; Now although an assignee in words or in writing declares his intention to refuse the estate, yet if, in fact, he takes advantage of it, he is not relieved from

the charges incident to it. A mere nominal dissent is not sufficient, it must be one in fact and in substance. If you think that the defendant did take to these premises and carry on the trade there for the benefit of the creditors he has done more than the law allows an assignee to do before he exercises his right of declaring off. A reasonable time is permitted for that purpose, but no case has gone so far as to say that an assignee may continue the trade for the benefit of the creditors, and after that refuse. If you think the defendant has carried on the trade for the benefit of the estate, you will find for the plaintiff; if you think it was done in friendship for the bankrupt merely, your verdict must be for the defendant.

Verdict for the plaintiff for $34\frac{1}{2}$ being one half a year's rent.

Scarlett and R. V. Richards for the plaintiff.

Marryatt and Comyn for the defendant.

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An express assent to the assignment, as far as regards leases belonging to the bankrupt, is necessary to vest such leases in the assignees of the bankrupt. *Copeland v. Stephens*, 1 B. & A. 593. The mere putting up the premises to auction by the assignees for the purpose of ascertaining their value, without describing themselves as owners, does not fix the assignees, *Turner v. Richardson*, 7 East, 335. And where the assignees kept the bankrupt's effects on the premises for nearly a year, and paid rent to protect the effects from a distress, under a protest against accepting the lease, and afterwards sold the effects on the premises and removed them; at the same time they, with the assent of the landlord, put up the lease for sale, but there were no bidders, and they afterwards kept the keys for three months, not being asked for them by the landlord, and making no other use of the premises: it was held that

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they were not liable as assignees of the lease. *Wheeler v. Bramah*, 3 Campb. 340. The assignees of a bankrupt released the bankrupt's under-tenant of part of the premises, and afterwards being asked by the landlord to elect, refused the original lease: Held that they were not liable as assignees of the term. *Hill v. Dobie*, 8 Taunt. 325. But intermeddling with and assuming the management of a farm has been decided to be an election to take. *Thomas v. Pemberton*, 7 Taunt. 206. And the entering and taking possession was held to bind the assignees, though the bankrupt's effects were on the premises, and the keys were given up immediately after the effects were sold. *Hanson v. Stevenson*, 1 B. & A. 303. See also *Hastings v. Wilson*, 1 Holt. N. P. C. 290.; and *Broome v. Robinson*, cited 7 East, 339.

WESTMINSTER,
Feb. 15, 1825.

REX v. HEPPEL.

An indictment for perjury committed in the Insolvent Debtor's Court, alleged that the defendant falsely, &c. swore "that his schedule presented to that court contained a full, true, and perfect account of all debts owing to him, whereas, in truth and in fact, the schedule did not contain a full, true, and perfect account of all debts owing to him," without specifying any debts omitted: Held, that this indictment was clearly bad, and that no trial ought to be had upon it.

THIS was an indictment for perjury, which stated "that the defendant, being in custody for debt, duly presented a petition for his discharge, together with his schedule to the Court for the relief of Insolvent Debtors. That the defendant in the said Court swore that the contents of the schedule and all and every part thereof were true, and that the defendant by the oath aforesaid falsely, wickedly, and corruptly swore in substance that the said schedule contained a full, true, and perfect account of all debts owing to him at the time of presenting his petition; whereas in truth and in fact the said schedule did not contain a full, true, and perfect account of all debts owing to him at the time, &c., and so the defendant committed wilful and corrupt perjury," &c.

Before the jury were all sworn, The Lord Chief Justice retired into the adjoining room, and consulted the other Judges who were then sitting for the dispatch of term business, and upon returning into Court his Lordship called upon the counsel in the cause and delivered the following judgment.

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I have desired that the jury might not be all sworn, in order that I might take the opinion of my learned brothers on the propriety of trying this indictment, and they all agree with me that I ought not to consume time in any such inquiry. It is quite impossible that the defendant can know, from allegations so vague and indistinct, what is to be proved against him; they convey no information whatever of the particular charges against which he ought to be prepared to defend himself. I remember the case of *J Anson v. Stuart (a)*, which was an action for a libel describing the plaintiff as a swindler, and a justification that the defendant had been guilty of divers acts of swindling and fraud, and on a demurrer to this plea the Court held that it was too general to be sustained.

This indictment is equally indefinite. Sitting here I have no power to quash this indictment, and I therefore order the case to be struck out of the list. I will take no notice of such a record. (b)

Brodrick and Prendergast for the prosecution.
Andrews for the defendant.

(a) 1 T. R. 748.

(b) See *Rex v. Deacon*, *supra*, p. 27. *Rex v. Tremearne*, *supra*, p. 147.

WESTMINSTER,
Feb. 16, 1825.

SMITH and Another v. DE WRUITZ.

The declarations of a holder of a bill of exchange made, whilst the bill is current, are not admissible against a subsequent holder under an indorsement made before the bill became due.

ASSUMPSIT by the indorsees against the acceptor of a bill of exchange.

The defence was, that *Crozax*, the drawer of the bill, to whose order it was payable, had originally received it from the defendant, to raise money for the defendant. That an agent of the defendant had by his desire procured the bill from *Crozax*, in order to return it to the defendant, and that *Crozax* fraudulently got the bill out of the agent's hand, and indorsed it to the plaintiffs, after he had committed an act of bankruptcy, by absconding within their knowledge, and upon which he had subsequently been declared a bankrupt. The bill was not due at the time of the indorsement. The assignees had got possession of the bill from the plaintiffs, but finding they had no title on it against the defendant, had returned it.

For the defence *Marryatt* offered to prove the declarations of *Crozax*, made whilst he was in possession of the bill.

Scarlett objected, and said that it was needless to argue the point, as it had recently been decided by the Court of King's Bench, in *Shaw v. Broome*, in which case a new trial had been granted, because such declarations had been received on the ground that such evidence was not admissible against a holder who acquired the bill before it became due.

ABBOTT Ld. C. J. assented to this, and rejected the evidence.

Verdict for the defendant.

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Scarlett and *F. Pollock* for the plaintiffs.

Marryatt and *Comyn* for the defendant.

In *Shaw v. Broome*, Trinity Term, 1824. *ex relatione Barnewall*, and 4 Dow. & Ry. 731. it was decided that the declarations of one who had been holder of a bill made after he had negotiated it, were not admissible against a subsequent holder, to whom the bill was transferred whilst current; on the ground, that such subsequent holder did not sue as the trustee of the preceding one nor stand on his title, but on that acquired by the *bonâ fide* taking of the bill. In *Pocock v. Billings*, *supra* 127. 2 Bing. 269. It was held, that in order to make such declarations evidence, they must, at all events, be made by a then holder of the bill. It would seem that where the plaintiff is trustee, or stands on the title of the previous holder of the bill or note, whose declarations are offered, such declarations are admissible, though made after parting with the bill or note, being equally against the interests of the person making them, and such seems to have been the opinion of the Court in delivering judgment in *Shaw v. Broome*.

EGERTON v. FURZMAN.

WESTMINSTER,
Feb. 18, 1825.

THE plaintiff and a third person laid a wager upon the event of a battle between two dogs, and had respectively deposited with the defendant as a stake-holder, a sum of money which was to be paid over by him after the wager was determined, to

A wager was deposited with a stake-holder on the event of a dog-fight, to be paid over to the winner after the event was determined. The money was not demanded of the stake-holder, until after the event was determined. The Judge discharged the jury from giving any verdict.

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the successful party. Some dispute having arisen between the parties respecting the fairness of the battle, the plaintiff being the unsuccessful party, claimed his proportion of the sum deposited, from the defendant, and on being refused brought this action to recover it.

ABBOTT Ld. C. J. On these circumstances being opened to the jury by *Brougham*, enquired whether the plaintiff had demanded his money from the defendant before the battle was fought, and on being informed that this was not the case, he discharged the jury from giving any verdict in the cause, saying that he would not sit to try which dog won the battle. He also said he had often taken the same course before, in similar circumstances. (a)

Brougham and *Holt* for the plaintiff.
Scarlett and *Chitty* for the defendant.

(a) It has been established by a series of cases, that money deposited in the hands of a stake-holder, on a wager illegal in its nature, may be recovered back from the stake-holder, after the event is decided, if demanded before it has been paid over; see *Cotton v. Thurland*, 5 T.R. 405. *Smith v. Bickmore*, 4 Taunt. 474. *Bate v. Cartwright*, 7 Price, 540. And at all events, whether the wager is illegal or not, either party demanding his deposit before the wager is won, is entitled to have it returned to him, and on refusal, may maintain an action against the stake-holder. *Eltham v. Kingsman*, 1 B. & A. 683. *Taylor v. Lendey*, 9 East, 49.

In *Robinson v. Mears*, Easter term, 1825, *ex relatione Cresswell*. ABBOTT Ld. C. J. said, "The case of *Egerton v. Furzman* was presented to me at the trial, as a case in which I was to be called upon to decide the question of which dog won, and on that ground alone, I refused to try the cause." That a Judge

is justified in striking causes out of the paper, where the attention of the Court would be occupied in deciding upon foolish wagers, to the prejudice of more important business; see *Brown v. Leeson*, 2 H. Bla. 43. *Squires v. Whisken*, 3 Campb. 140. *Ditchburn v. Goldsmith*, 4 Campb. 152. *Eltham v. Kingsman*, 1 B. & A. 683. *Rex v. Deacon*, *supra* 27. n. a. But it should seem, after the case of *Cotton v. Thurland*, above cited, that it is not in the discretion of a Judge to refuse to try an action brought to recover a deposit from a stakeholder, however frivolous or illegal the wager may be. The Court of Exchequer, in *Bate v. Cartwright*, set aside a nonsuit, in an action against the stakeholder, where the Judge had nonsuited, on the ground of an action of that nature, being a waste of time and an hindrance of the business of other suitors.

1825.
EGERTON
v.
FURZMAN.

ADJOURNED SITTINGS IN LONDON.

TURNER v. HADEN and Others.

GUILDHALL,
Feb. 22, 1825.

THIS was an action by the plaintiff as indorsee against the defendants as acceptors of two bills of exchange; one for the sum of 36*l.*, dated 4th June 1824, the other for 60*l.* 4*s.* 6*d.* dated 14th June 1824.

Both bills were accepted payable at Messrs. *Marsh* and Co. *Berners Street*. The first-mentioned bill became due on the 21st August 1824, the other on the 31st of the same month.

It appeared that the defendants who kept an account with Messrs. *Marsh* and Co. had always a large balance in the hands of *Marsh* and Co. from the time of drawing the bills to the time *Marsh* and Co. stopped payment, *viz.* the 13th September in the same year, than the amount of both these bills.

Held that the acceptors of bills of exchange, payable at a banker's in London, were not discharged from their liability, although the holder neglected to present them for payment at the banker's before they failed, which was several weeks after the bills became due; and although the acceptors at all times, up to the failure of the bank-

er's, had a balance in their hands sufficient to cover the acceptances.

1825.
TURNER
v.
HADEN.

Scarlett for the defendants, contended they were discharged from all liability upon these bills by the laches of the holder in not presenting them for payment within *a reasonable time*. That although since the 1 & 2 G. 4. c. 78. an acceptance like the present does not oblige the holder to present the bill for payment at the place named, still the acceptor will be exonerated where he proves an actual loss sustained by him in consequence of an omission to present the bill at such place within *a reasonable time*. *Rhodes v. Gent*, 5 B. & A. 244. though before the statute 1 & 2 Geo. 4. c. 78. recognizes the principle contended for.

Parke for the plaintiff relied on the case of *Sebag v. Abitbol*, 4 M. & S. 462.

ABBOTT Ld. C. J. directed the jury to find a verdict for the plaintiff giving the defendants liberty to move.

Verdict for the plaintiff.

J. Parke and *Cameron* for the plaintiff.
Scarlett and *Hutchinson* for the defendants.

In the following *Easter* Term, *Scarlett* moved to set aside this verdict on the ground of laches in the holder in not presenting the bill for payment at *Marsh* and Co. in a reasonable time. The Court refused the rule. (a)

(a) See Bayley on Bills, 178. 4th edit.

1825.

TODD and Others v. ROBINSON.

GUILDHALL,
Feb. 26, 1825.*ASSUMPSIT* for goods sold and delivered.

The plaintiffs were wholesale linen-dealers in London, the defendant a shopkeeper at *Driffield* in *Yorkshire*.

The defendant had employed one *Womac*, who resided in London, to order goods to be sent to him by the plaintiffs on credit. Six parcels, so ordered, were received and paid for by the defendant. The first of these dealings took place on 1st March 1823, and in November following it was discovered that *Womac* had ordered goods in the defendant's name to be sent by the usual conveyance without the defendant's authority, and had himself intercepted and appropriated them to his own use, and afterwards absconded.

This action was brought to recover the sum of 45*l.*; and it was proved that the defendant had in fact authorized *Womac* to order goods to the whole amount with the exception of 14*l.* The payment of this sum was resisted, on the ground that the plaintiffs trusted *Womac* at their own peril, and that the defendant was not liable beyond what he had actually authorized *Womac* to order. The plaintiffs and the defendant never met until the discovery of *Womac's* frauds.

The defendant, a linen-draper in *Yorkshire*, had in several instances employed *A. B.*, as his agent, to purchase on credit goods of the plaintiffs, linen-drapers in London. *A. B.* without the authority of the defendant, orders goods in his name to be sent by the usual conveyance, and intercepts them to his own use: Held, that the defendant is liable for such goods, he having by the previous dealings authorised the plaintiffs to treat *A. B.* as his agent.

ABBOTT Ld. C. J. The liability of the defendant to the only disputed part of this demand depends on the question, whether the defendant has

1825.
 TODD
 v.
 ROBINSON.

by his own acts and conduct constituted *Womac* his general agent to order goods. The authority actually given in each particular instance to *Womac* can only be known to the defendant himself; the plaintiffs can only look to the appearances held out by him; and it is for you to say whether the defendant by his own act and conduct had induced the plaintiffs to believe that *Womac* was his agent for the purpose of ordering these goods. If you think he has so authorized the plaintiffs to treat *Womac* as his agent, then the defendant is answerable notwithstanding he may in this particular instance have given *Womac* no such instructions.

Verdict for the plaintiffs for the whole demand.

Scarlett and *F. Pollock* for the plaintiffs.

Denman C. S. and *J. Parke* for the defendant.

See *Hazard v. Treadwell*, 1 Str. 506. *Boulton v. Hillersden*, 1 Ld. Raym. 224. *Whitehead v. Tuckett*, 15 East, 400. Lord ELLENBOROUGH's judgment in *Pickering v. Busk*, 15 East, 43. *Neal v. Erving*, 1 Esp. N.P.C. 61. Where there have been no previous dealings from which an authority to buy on credit can be implied, a master is not liable for goods furnished to the servant in his name. 1 Show. 95. *Boulton v. Arsdlen*, 3 Salk. 234. *Stubbing v. Heintz*, Peake's N. P. C. 66. *Pearce v. Rogers*, 3 Esp. N. P. C. 214. *Rusby v. Scarlett*, 5 Esp. N.P.C. 76.

1825.

STIERNELD *v.* HOLDEN and Another.GUILDHALL,
March 1, 1825.*TROVER* for a quantity of coffee.

This action was brought in the name of Baron *Stiernel* to recover the value of 80 bags of coffee consigned to him from *Demarara*.

The coffee was the produce of certain estates in *Demarara*, which formerly belonged to a person of the name of *Fileen*. Upon the death of *Fileen*, the *Swedish* government appointed certain curators to take the management of the estates for the benefit of those who were interested in them: the *Swedish* ambassador, the present plaintiff, was the agent of the curators in this country.

A factor places goods in the hands of a broker as security for an advance to himself, and with directions to sell. The goods are sold before any revocations of these directions: the principal cannot maintain *trover* against the broker.

For some time before the arrival of the coffee, which was the subject of the present action, a Mr. *Stewart* had been employed by the plaintiff and also by the curators to receive and sell the produce of these estates. The consignments were generally made to the plaintiff but sometimes to *Stewart*; when made to the plaintiff he indorsed the bills of lading to *Stewart*, who disposed of the goods, and accounted for the proceeds to the curators of *Fileen's* estates.

In 1823 the plaintiff went to *France*, and on his departure left with Mr. *Stewart* a written authority to open all letters that might come for him from *Demarara* during his absence, and to indorse in his name any bills of lading which they might contain.

About the 25th November 1823, the plaintiff

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STIERNELD
v.
HOLDEN.

being in *France*, the bills of lading of the goods in question came in a letter addressed to the plaintiff from *Demarara*, and Mr. *Stewart* opened the letter and took out the bills of lading. On the 26th *November*, *Stewart* delivered these bills of lading to the defendants with the following indorsement on each of them: "deliver the within mentioned coffee to Messrs. *Holden* and *Vanhouse*, or their order *p. proc.* of Baron *Stiernel*d. Mr. *Stewart*."

When *Stewart* delivered the bills of lading to the defendants he directed them to sell the coffee, and at the same time requested them to advance a sum of money to which he conceived the proceeds of the sale would amount at the current prices at that time; the defendants accordingly accepted a bill for 1500*l.* at three months; this bill *Stewart* discounted immediately, and applied the money to satisfy his own engagements. It appeared that the defendants would not have made this advance to *Stewart* had he not indorsed to them the bills of lading. *Stewart* was at this time considerably in advance to the *Fileen* estate. The bill of the defendants became due on the 29th *February* 1824, and was duly honoured.

It appeared that *Stewart* had on former occasions placed bills of lading of the proceeds of the *Fileen* estate in the hands of the defendants for the purposes of sale, and that the defendants knew that *Stewart* was not the owner of the coffee in question but only the agent for the *Fileen* estate.

Before the defendants sold the goods in question they consulted *Stewart*, who agreed with them that on account of the state of the markets an immediate sale was desirable. *Stewart* stopped payment

on the 28th *November*. On the 3rd *December* the goods were sold by auction at the prompt of a month or one per cent. discount on previous payment, the net proceeds of which sale were 1508*l.* 7*s.* 9*d.* No countermand of the authority to sell was given to the defendants by the plaintiff, or any person on his behalf, until the 6th *December*, after the sale had taken place; nor did it appear that the defendants were informed of *Stewart's* having stopped payment until that day.

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STIERNELD
v.
HOLDEN.

The *Attorney-General* for the defendants submitted that upon this evidence, the plaintiff could not recover in this form of action; had the goods been demanded before the defendants had contracted to sell, then indeed a subsequent sale might have amounted to a conversion; but in the present case the plaintiff is clearly not entitled to recover.

Marryatt for the plaintiff. *Stewart*, in placing the goods in the hands of the defendants, and obtaining an advance to himself on their security, was guilty of a breach of his duty as a factor; the defendants, who knew that he was exceeding his authority, were parties to the wrong which he did to his principal, and in assuming any dominion over goods which thus wrongfully came into their hands, were guilty of a conversion, and were therefore liable to this action even before the sale. But the sale itself was without authority, and was a new act of conversion. *Stewart* had the power to put the goods into the defendant's hands to sell them for his principal; he had no power to put them into their hands to sell for the purpose of securing

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STERNELD
v.
HOLDEN.

an advance made to himself. It is in this latter manner that he has assumed to deal with the goods, and the sale which was made under a power thus usurped by the factor, is without lawful authority, and amounts to a conversion. The direction to sell given by *Stewart* to the defendants, is accessory to the pledge which he made to them, and is tainted by its illegality. It would be highly inconvenient that a sale should be held lawful under such circumstances, as the person employed is under a temptation to sell at a price which would cover his advance, although it might not be the highest he could procure. And it is no answer to this that no such loss has arisen here. The argument is drawn from the general impolicy of allowing a man to have an interest contrary to his duty, not from a particular inconvenience having arisen in an individual case.

ABBOTT Ld. C. J. It appears to me that as there was a clear authority to sell, and no revocation by the plaintiff of that authority prior to the sale, this action cannot be maintained. If there is an actual sale under the authority of the proprietor of the goods, trover cannot be maintained; whether an action for money had and received will lie, is another question; but in the present form of action. I am of opinion that the plaintiff cannot recover.

Nonsuit, with liberty to move to enter a verdict for 1508*l.* 7*s.* 9*d.*

Marryatt, Gurney, and Maule for the plaintiff.

The *Attorney-General* and *F. Pollock* for the defendants.

1825.

STIERNELD
v.
HOLDEN.

In the following *Easter Term Marryatt* moved to set aside this nonsuit, and enter a verdict for the plaintiff, and cited the cases of *M'Combie v. Davies*, 6 East. 538. *Truettel v. Barandon*, 1 B. Moore, 543. *Featherstonhaugh v. Johnston*, 8 Taunt. 237.; but the Court refused the rule, being of opinion that the action should have been money had and received, and not trover. The Court observed, that *Stewart* had clearly an authority from the plaintiff to indorse the bills of lading, and in pursuance of that authority he authorised the defendants to sell; there was no pretence for saying, that the defendants acted otherwise than *bonâ fide*, in the sale of these goods, there being no evidence of their having made any sacrifice for the purpose of reimbursing themselves the advance they had made to *Stewart*, the circumstance even of his failure not in fact being known to them at the time of the sale. If the sale had not been warranted, then, certainly, the plaintiff would not be bound to accept the proceeds of the goods, but might recover in the present form of action. *Stewart* authorized the defendants to sell, and also authorized them to apply the proceeds of such sale to the defendants' own use in liquidation of the advance they had made to him. He was justified in authorizing them to sell, and the sale, therefore, cannot be impeached. The defendants are not authorized in retaining for their own use the produce of this sale; but for the misapplication of such produce, this is not the proper form of action.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

HILARY TERM,

6 GEO. IV. 1825.

ADJOURNED SITTINGS IN LONDON.

GUILDHALL,
Feb. 21. 1825.

LEIGH v. SMITH.

In order to discharge a wharfinger from his responsibility for goods left with him, to be sent coastwise, a delivery to the mate or some other officer of the ship by which they are to be conveyed, is necessary.

ASSUMPSIT against the defendant, a wharfinger, for not safely shipping certain casks of tallow to the plaintiff at *Liverpool*.

The casks had been delivered at the defendant's wharf in *London*, and a receipt given containing the terms on which the defendant received goods for shipment. The dispute in the cause was whether or no the casks had actually been put on board the *Mars*, in which vessel they were to be sent; or delivered into the custody of the persons having charge of the ship, so as to relieve the wharfinger.

For the defendant it was proved, that the casks had been rolled alongside the ship, then lying close to the wharf and taking in her cargo, and not traced further; and a witness was asked what was the usage in shipping goods at wharfs coastwise.

1825.

LEIGH

v.

SMITH.

This was objected to on the ground of there being a written agreement. But His Lordship received the evidence on the authority of *Cobban v. Downe*, 5 Esp. N. P. C. 41. The witness stated, that they generally gave the goods to the ship's crew, who took them on board, and that they usually delivered them in charge to a mate of the ship.

BEST C. J. in summing up, said, the question is, whether the casks were lost by the negligence of the master of the ship, or by that of the defendant. By the terms of the contract, the defendant undertakes to ship these goods on board some vessel. It lies upon him, therefore, to show that he has done this; it is not enough to show a delivery to a ship's crew merely, they must be delivered to the mate of the ship or to some officer. The case to which I have been referred, shows that to be necessary, and the usage proved in this case corresponds with it.

Unless you are satisfied the casks were actually delivered into the charge of some officer of the ship, the plaintiff is entitled to your verdict.

Verdict for the plaintiff.

Wilde Serjt. and *J. Parke* for the plaintiff.

Vaughan Serjt. and *E. Lawes* for the defendant.

1825.

GUILDHALL,
Feb. 22, 1825.

GILMAN and Another v. ROBINSON.

The defendant, a linen-draper in *Yorkshire*, had in several instances employed *A. B.* as his agent, to purchase on credit goods of the plaintiffs, linen-drapers in *London*, *A. B.* without the authority of the defendant, orders goods in his name, to be sent by the usual conveyance, and intercepts them to his own use: Held, that the defendant is liable for such goods, he having, by the previous dealings with the plaintiffs, and with other persons, held out *A. B.* as his general agent to purchase goods.

Goods sold and delivered.

The plaintiffs were linen-drapers in *London*, the defendant a shopkeeper in *Yorkshire*. The facts of this case were similar to those in *Todd and Others v. Robinson*, *supra*, p. 217.; and the action arose out of frauds committed by *Womac* on the same defendant. Several instances were proved in which the defendant had paid the plaintiffs for goods ordered on credit by *Womac*, and received by the defendants, and the demand in this case was for 70*l.* for goods ordered of the plaintiffs by *Womac*, and put in the same mode of conveyance as had been recognized by the defendant in former dealings. Those goods *Womac* had got possession of, and had in fact ordered without any authority from the defendant. *Womac* resided in *London*, and the plaintiffs and defendant had not seen each other in the transactions until the discovery of *Womac's* frauds, who had been convicted of obtaining goods under false pretences.

Several instances were proved in which the defendant had ordered goods on credit through *Womac* of other *London* tradesmen in 1823, the time of the dealings in question.

For the defendant, it was contended that he was not liable beyond the authority actually given to *Womac*. That a general agency could only be implied from particular authorized dealings, in cases where general agencies were usual in the common dealings

of mankind, and in particular trades. That it was not usual for country shopkeepers to constitute general agents to order goods of the wholesale *London* tradesmen, and that in this respect the case was distinguishable both from the authority implied between master and servant, and the authority to underwrite, inferred from one or more recognized instances.

1825.
GILMAN
v.
ROBINSON.

BEST C. J. in summing up to the jury, said, that the question for them to consider was, whether or no the defendant had held *Womac* out to the world as his general agent to order goods. That such agency could not be implied from a single recognized dealing; but if in repeated instances he had recognized his authority to order goods in his name and credit, he had so far made him his general agent. That it would be mischievous to hold that the party who had clothed another with his credit and authority should be allowed to screen himself from such responsibility. If you think the defendant has held *Womac* out as his general agent, you will find for the plaintiffs.

Verdict for the plaintiffs, 70*l.* (a)

Wilde Serjt. and F. Pollock for the plaintiffs.
Vaughan Serjt. and Parke for the defendant.

(a) See *Todd and Others v. Robinson*, *supra*, p. 217. and *notis*.



1825.

GUILDHALL, **BROMLEY**, Assignee of **HORNE**, a Bankrupt,
Feb. 28. 1825. **v. KING.**

The declarations of a bankrupt made before the bankruptcy, are not admissible to prove the trading, in an action by the assignees.

ASSUMPSIT.

In order to prove the trading of *Horne*, a witness was asked to a conversation with *Horne* before the bankruptcy, in which he had stated his being engaged in acts of trading.

This was objected to by *Pell* Serjt. for the defendant, on the general principle that the bankrupt is inadmissible to support the bankruptcy, and that the only instances in which his declarations are receivable, are the admissions of a debt made before bankruptcy, and his declarations made at the time of an equivocal act. The first, because such admissions are obviously against the interest of the person making them; the second, to show the character of the act brought forward as an act of bankruptcy. That no such reason applied to the trading which was capable of distinct and independent proof.

Wilde Serjt. The declarations of a bankrupt being admissible to show both the petitioning creditor's debt and act of bankruptcy must be also evidence to prove the trading. There is no distinction, and no case has been shown.

BEST C. J. The general rule undoubtedly is, that a bankrupt is incompetent to support the commission. The instances in which his declarations are received, are exceptions to the general rule,

and that on the grounds stated; I know of no other instance in which his declarations are admissible to establish any chain of the proof necessary to the title of the assignees. And I think it would be extremely dangerous to admit such proof, it being impossible to ascertain whether such declarations were not made with the very purpose of the bankruptcy. I am clearly of opinion that the evidence ought to be rejected.'

1825.
BROMLEY
v.
KING.

The case of *Parker v. Barker*, 1 Bro. & Bing. 9. was afterwards cited. His Lordship, after reading that case, said, that he retained his opinion; but as some such evidence seemed to have been there admitted, it would be better to receive the proof, and give the defendant leave to move to enter a non-suit.

Verdict for the defendant.

Wilde Serjt. and *Kelly* for the plaintiff.
Pell Serjt. and *Tindal* for the defendant.

NORTON v. HERRON.

GUILDHALL,
Feb. 28, 1825.

THIS was an action of *assumpsit* for the breach of the following agreement declared on specially.

“Memorandum of agreement made this 14th day of April, 1824, between *George Herron* on behalf

of the one part, and the plaintiff of the other part, stipulated to execute a lease of certain premises to the plaintiff. These premises were proved to belong to *A. B.*: Held, that the defendant was personally liable.

The defendant by a written agreement expressed to be made by himself on behalf of *A. B.*

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 {
 NORTON
 v.
 HERRON.

of *Edward Barron*, of *Norwich*, in the county of *Norfolk*, of the one part, and *James Norton* of the other part, *viz.* first, the said *George Herron* doth hereby agree to execute unto the said *James Norton* a lease of all the messuage, late in the possession of *Nicholls*, situate in the *High Street, Borough*, with the appurtenances, to hold to him the said *James Norton*, his executors and assigns, from the 12th day of *May*, being the half-quarter between *Lady* day and *Midsummer* day next, for the term of 7, 14, or 21 years, at and under the usual rent of 130*l.* payable quarterly, which lease shall contain all the usual covenants; all outgoings to be cleared up by the said *George Herron* to the said 12th day of *May*, and the said *James Norton* doth agree to put the said premises in tenantable repair.

(Signed) “ *George Herron.*
 “ *James Norton.*”

The premises in question belonged to *Edward Barron*, whose agent in the management of them, the defendant was; the lease was not executed owing to the refusal of the tenant in possession to quit.

The cases of *Appleton v. Binks*, 5 East, 148. *Burrell v. Jones*, 3 B. & A. 47. *Iveson v. Conington*, 1 B. & C. 160. were cited for the plaintiff, to show that the agreement made the defendant personally liable.

For the defendant it was argued, that the contract was made expressly on the behalf of the principal to whom the subject matter of the agree-

ment belonged: and it was attempted to distinguish between deeds and parol agreements.

1825.
NORTON
v.
HARRON.

BEST C. J. It is impossible to distinguish this case from those cited: the defendant has clearly and in terms made himself responsible, although he commences by describing himself as agent. No such distinction as that contended for exists, and it is negatived by the authorities referred to.

Verdict for the plaintiff, damages 75*l.* (a)

Pell and *Wilde* Serjts. and *Crowder* for the plaintiff.

Vaughan Serjt., *E. Lawes* and *Thessiger* for the defendant.

(a) See *Cass v. Ruddle*, 2 Vern. M. Ca. 280. *Clayhill v. Fitzgerald*, 1 Wils. 28. 58.

ROWLAND v. ASHBY and Another.

GUILDHALL,
March 3, 1825.

ASSUMPSIT for goods sold and delivered.

The defence was, the plaintiff was a partner in the transaction in question with his son, who had been made a bankrupt, and that the defendants had settled the claim with the son.

To prove the partnership, the attorney to the commission against the son, who produced the examination of the plaintiff taken before the commissioner, was asked whether the plaintiff had not at the examination, admitted that he was in partnership with his son. There was no such admission

Parol evidence is admissible to prove matters deposed by a party on his examination before commissioners of bankrupt, material to the inquiry, such matters not being contained in the written examination taken by the commissioners.

1825.
ROWLAND
v.
ASHBY.

in the written examination produced. It was objected by the counsel for the plaintiff that the written examination was the only evidence of what passed before the commissioners material to the inquiry, that the matters sought to be given in evidence were material, and the plaintiff had been questioned to them. That it must be presumed the commissioners had done their duty, and made a faithful account of the plaintiff's evidence. That the case was the same as the examination of a prisoner before a magistrate under the statutes of *Philip* and *Mary*, where the examination taken by the magistrate was the only proof, and nothing could be added by parol.

BEST C. J. I think I ought to receive the evidence if it should appear that the matter to be added was material to the examination, but that very strong proof ought to be adduced of the plaintiff's having said that which is alleged. The stat. of *Philip* and *Mary* has been used for a different purpose than was intended ; and my opinion is, that upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner beyond what was taken down by the committing magistrate. (a)

Verdict for the plaintiff.

Vaughan Serjt. and *R. V. Richards* for the plaintiff.
Wilde Serjt. and *Chitty* for the defendant.

(a) See the elaborate judgment of GROSE J. in *Lambe's Case*, 2 Leach, C. C. 554. 4th edit. where it was held that a voluntary

confession by a prisoner on his examination before a magistrate, reduced into writing, was admissible, though the magistrate had neglected to sign it, and the prisoner had refused. The object of the acts of *Philip* and *Mary* is there said to be, to enable the judge and jury to see, whether the witnesses are consistent or contradictory in the evidence they give.

Parol evidence is admissible of a prisoner's declarations before a magistrate, when no written examination was taken down. *Rez v. Hall*, cited in *Rez v. Lambe*, 2 Leach, C. C. 559. A written examination before a magistrate will not exclude a previous parol declaration made to a third person, and not reduced into writing. *Mac Nally* on Evidence, 45. *Starkie* on Evidence, Part IV. p. 51.

The object of the examinations taken by commissioners of bankrupts is to perpetuate testimony, 5 Geo. 2. c. 30. s. 41. The examination of a party taken by the commissioners is evidence against him, though part only of his depositions were taken down, if read over to him and signed by him. *Milward v. Forbes*, 4 Esp. 172.

1825.
ROWLAND
v.
ASHBY.

WILLIAMS and Others v. RAWLINSON.

GUILDHALL,
March 4, 1825.

DEBT on bond in the penal sum of 10,000*l.* dated 7th January 1822.

The condition, after reciting that *John Threlfall* had for some time past had a banking account with the plaintiffs, stated "that if the said *John Threlfall*, his heirs, &c. do and shall from time to time, and at all times hereafter reimburse, and fully pay and satisfy the said plaintiffs or the survivor or

A bond conditioned to indemnify, and save harmless the obligees, for "such sums as they, in their banking business, should within ten years advance or pay, or be liable to advance or pay for or on account of their accepting, discounting, &c. any bill of exchange, notes, &c. which *A. B.* should from time to time draw upon or make payable, &c. at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c. on the credit of the said *A. B.*, or on his account; and also all such wages and allowances for advancing, paying, &c. such bills, &c. advances, payments, engagements, and accommodations, not exceeding the sum of 5000*l.* in the whole, together with interest on such advances, &c. : Held to guarantee running accounts and not satisfied by the first payment of 5000*l.* Held also, that such bond ought to be stamped with a 9*l.* stamp under 55 G. 3. c. 184. Schedule, Part I. title Bond.

or be liable to advance or pay for or on account of their accepting, discounting, &c. any bill of exchange, notes, &c. which *A. B.* should from time to time draw upon or make payable, &c. at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c. on the credit of the said *A. B.*, or on his account; and also all such wages and allowances for advancing, paying, &c. such bills, &c. advances, payments, engagements, and accommodations, not exceeding the sum of 5000*l.* in the whole, together with interest on such advances, &c. : Held to guarantee running accounts and not satisfied by the first payment of 5000*l.* Held also, that such bond ought to be stamped with a 9*l.* stamp under 55 G. 3. c. 184. Schedule, Part I. title Bond.

1825.
 WILLIAMS
 v.
 RAWLINSON.

survivors of them, and all and every other person or persons who shall or may become partner or partners with them, or either of them in the banking business, their and each of their executors, &c. every sum and sums of money which they the said plaintiffs, or the survivor or survivors of them, or any partner or partners in their said banking business, shall within ten years from the date hereof, advance or pay, or be liable to advance or pay for or on account of their accepting, indorsing, discounting, paying, or satisfying any bill or bills of exchange, drafts, notes, orders, or other engagements whatsoever, which he the said *John Threlfall* shall from time to time draw or cause to be drawn upon them, or make payable at their said banking house, and also all and every other sum and sums of money which they the said plaintiffs, and the survivors, &c. shall within the period aforesaid, otherwise lay out, pay, or advance, or become in anywise liable to pay on the credit of the said *John Threlfall*, or on his account to any person or persons whomsoever, and also all such wages and allowances for advancing and paying such bill or bills, drafts, notes, acceptances, advances, payments, engagements, and accommodations *not exceeding the sum of 5000*l.* in the whole*, together with interest for such sum and sums of money as they or any of them shall from time to time advance, &c. as is usually charged, &c. and shall indemnify and save harmless, &c. then this obligation to be void otherwise to remain in full force and effect."

The stamp on the bond was of the value of 9*l.*

At the time the bond was delivered, *Threlfall* was indebted to the plaintiffs in 3500*l.*, and it did

not appear that this was communicated to the defendant or the other sureties on the bond. The dealings between *Threlfall* and the plaintiffs subsequent to the bond were to the amount of 350,000*l.* and payments to that amount minus 400*l.* had been made.

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WILLIAMS
v.
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Three objections were made by *Cross* Serj. for the defendant. 1st. that the condition of the bond only guarantied dealings to the amount of 5000*l.* and therefore the bond was satisfied by the payment of the first 5000*l.* that was incurred, and that it was not meant to extend to running dealings beyond that sum.

2dly. That if the condition should be construed to extend to floating balances during the whole ten years, the bond would be invalid for want of a 25*l.* stamp, inasmuch as the sums secured would in that case be indefinite, and he referred to *Scott v. Alsupp* and others, & *Price* 20.

3dly. That the defendant could not be made liable for the existing balance at the time of the bond directly or indirectly; that the plaintiffs were bound as against the sureties to have applied all the payments made subsequent to the bond to the present account.

That all the cases in which it had been held that payments made generally were to be applied to the first items in the accounts were between the original parties, and the principle had never been enforced against sureties.

BEST C. J. Upon the construction of this instrument I feel no difficulty. It is quite clear that the parties intended to guarantie the floating account

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v.
RAWLINSON.

during the period stipulated for, but to limit their liability not to dealings to the extent of 5000*l.* but to any one default to that amount. Upon the 2d point the case is equally clear. The sum to be recovered on this bond is limited to 5000*l.* and that brings it immediately within the words of the stamp act. Upon the third point I think the best plan will be to take the verdict for the whole sum with liberty to the defendant to move to reduce it to 400*l.*

Verdict for the plaintiffs, damages 3,500*l.* (a)

Wilde Serjt. for the plaintiffs.

Cross Serjt. and *J. Parke* for the defendant.

In the following *Easter* Term, *Cross* Serjt. applied for a new trial on the two first points, and also to reduce the damages to the sum of 400*l.* The Court were of opinion that the two first objections were unfounded, but granted a rule *nisi* to reduce the damages on the third point, which has been since discharged after argument.

(a)) See *Mason v. Pritchard*, 12 East, 227. S. C. 2 Campb. 436. *Kirby v. The Duke of Marlborough*, 2 M. & S. 18.

LENT ASSIZES, 6 Geo. IV.

OXFORD CIRCUIT.— OXFORD.

Coram LITLEDALE J.

DOE on the demise of KERBY v. CARTER.

OXFORD.
March 3, 1825.

EJECTMENT by Dr. *Kerby* as the vicar of *Bampton* to recover possession of glebe land in the defendant's possession.

The incumbent of a living, may sustain ejectment against parties in possession of the glebe lands, though the current year of a tenancy from year to year, created by his predecessor, is unexpired.

The counsel for the plaintiff proved that the defendant had been tenant to Dr. *Richards* who preceded the lessor of the plaintiff in the enjoyment of the living; and gave in evidence a notice to quit by Dr. *Richards* to the defendant which expired previous to the demise. The counsel for the defendant cross-examined the witnesses with a view to shew that the defendant's tenancy did not expire at the time to which the notice had relation.

LITLEDALE J. was of opinion that this was immaterial, as the new vicar had a right to immediate possession notwithstanding the tenancy recognized by his predecessor.

The counsel for the plaintiff then proved the institution and induction of the lessor of the plaintiff to the living previous to the date of the demise.

The institution of a party to a living, reciting the cession of his pre-

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Dox on the
demise of
KERRY
v.
CARTER.

decessor, followed by induction, is sufficient evidence to support an ejectment; though the predecessor is shewn to have been in possession; and no other evidence of his cession is given.

Talfourd for the defendant, submitted that as the plaintiff's counsel had shewn *Dr. Richards* in possession of the living, they were bound to prove his resignation, otherwise the institution and induction of his successor would be void.

Taunton, for the lessor of the plaintiff, replied that as the institution purported to be "on the cession of *Dr. Richards*," this was sufficient *facie* evidence to sustain the induction.

Talfourd, on the other hand, contented that the recital, was not the best evidence of the cession, which must have been accomplished in a formal manner, and consequently it was not received.

LITLEDALE J. I think that as the institution recites the cession, that is sufficient *facie* evidence of the cession being especially as it is acted on; and that the plaintiff is entitled to recover.

The plaintiff accordingly obtained a rule.

Taunton for the plaintiff.

Talfourd for the defendant.

Talfourd in the following *Easter* term moved for a new trial, on the ground of misdirection; but the Court refused to grant a rule.

1825.

HEREFORD.

Coram LITTLEDALE J.

EVANS v. VERITY.

HEREFORD.
March 23, 1825.

ASSUMPSIT for lands bargained and sold, with the usual money counts.

The only evidence to sustain the action, applied to the "account stated," and was as follows :

The plaintiff in a conversation with the defendant said, " pay me the 10*l*. you owe me," the defendant said he would, provided the plaintiff had not moved the grates, which he considered as fixtures ; the plaintiff in reply denied that they were fixtures, and told the defendant that if he would not pay him he would sue him.

Held that a qualified acknowledgment of a sum due to the plaintiff would not entitle him to recover upon a count on an account stated.

Maule for the defendant contended, that this was not an unqualified admission of any sum due, and consequently the plaintiff must be nonsuited.

Ludlow for the plaintiff. The defendant is asked to pay that which he owes : in his answer he does not deny that he owes the sum named, but insists that he is not liable to pay it, on a ground which would not afford any defence to an action for the money. The non-delivery of fixtures might be the

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EVANS

v.

VERITY.

matter of a cross action, but is not a matter of set-off. Here an item of 10*l.* is admitted to be due on one side of the account, and no item of account on the other side is insisted on or stated.

LITTLEDALE J. The plaintiff here does not prove any consideration on which the defendant became indebted to him, but insists on his right to recover upon an admission of liability, made by the defendant on a statement of account between them. If the whole of the conversation be taken together, it appears to me there is no admission of liability.

Nonsuit.

Ludlow and *Cross* for the plaintiff.
Maule for the defendant.

In the following *Easter Term*, *Ludlow* moved to set aside this nonsuit and contended that the defendant's admission of the debt was in no wise weakened, because the defendant at the same time chose to set up a claim which might have been a fit subject for an action of trespass.

The Court in refusing the rule stated, that the defendant might, by what passed, have meant that he would have paid the 10*l.* if he had had all he bargained for; and if so, it is no acknowledgment of 10*l.* being due. It is not an unqualified acknowledgement, but only an admission that 10*l.*

would have been due if something else had not happened.

Rule refused.

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REX
v.
VERITY.

Knowles v. Michel, 13 East, 249. *Highmore v. Primrose*, 5 M. & S. 65.

REX v. HOBBY.

HEREFORD.
March 24,
1825.

THE defendant had been indicted for a misdemeanour at the last assizes, when he had pleaded not guilty, and traversed to the present assizes.

On the trial of a misdemeanour, the prosecutor cannot appear for the purpose only of questioning the proof of notice of trial.

The case being called on, *Cross* for the prosecution required before the jury were sworn that the defendant should prove notice of trial, stating that he appeared only to question the sufficiency of the notice, and not for the prosecutor generally.

When the prosecutor appears, he cannot call for proof of notice.

For the defendant it was objected that the prosecutor could not appear by counsel or otherwise, unless he appeared generally.

Cross, in support of his right to oppose the proof of notice without appearing generally, mentioned the practice of appearing to object to notice of appeal at sessions.

In answer to this it was said that in the case of appeals to sessions, notice was required by statute to give the court jurisdiction, and always formed a part of the appellant's case, in trials whether civil

1825.

REX
 v.
 HENRY.

or criminal, there is no practice to require proof of notice of trial. In misdemeanors, if the prosecutor appears by counsel or otherwise, no proof of notice can be required, if he do not appear, the defendant on proof of notice by affidavit, will be entitled to his acquittal. If he fail in such proof, the court may adjourn the trial.

LITTLEDALE J. after consulting GARROW B., held that the prosecutor must appear generally or not at all, and that if he appeared he could not call for proof of notice of trial.

He accordingly appeared by his counsel: the trial proceeded, and the defendant was acquitted.

Cross and Powell for the prosecution.

Ludlow and Maule for the defendant.

HEREFORD.
 March 24,
 1825.

REX v. BEAVAN and Others.

On an indictment for a forcible entry and detainer under the statutes of R. 2. and Jac. 1., the party grieved is not a competent witness.

INDICTMENT on the statutes of R. 2. (a.) and Jac. 1. (b.) for a forcible entry, and expulsion from and detainer of a messuage, &c. of which the prosecutor *Charles Roberts* was possessed for an unexpired term of years.

The indictment had been removed by *certiorari* into the King's Bench at the instance of the defendants.

(a) 5 R. 2. st. 1. c. 7. and 15 R. 2. c. 2.

(b) 21 Jac. 1. c. 15.

The wife of the prosecutor being called as a witness for the prosecution,

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 }
 REX
 v.
 BEAVAN.

Maule for the defendants objected, that she was incompetent, on the ground of her husband's interest. This is not like the ordinary case of a prosecutor who has nothing to gain or lose by the event of the prosecution. If the defendants be convicted, the prosecutor will be entitled under the statutes of R. 2. and Jac. 1. to restitution of his term, and has therefore, a direct interest in the event of the cause.

Whitcombe for the prosecution. The court of King's Bench will not necessarily award restitution. The justices below, indeed, are bound to give such a judgement on a condition for forcible entry under the statutes, but it is discretionary whether the court of King's Bench will do so. The interest, therefore, of a prosecutor is too remote, and contingent to disqualify the witness.

LITLEDALE J. expressed himself strongly of opinion that the witness was incompetent, on the ground of the prosecutor's interest, and compared the case to that of an informer, who is an incompetent witness in support of a conviction when he is entitled to a part of the penalty, but stated that as there was no express decision on the subject he would save the point.

The defendants were acquitted. (a)

(a) The law of evidence, as it relates to the competency of

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v.

BEAVAN.

Whitcombe for the prosecution.*Maule* for the defendants.

witnesses interested in the event of a criminal proceeding, seems not very consistent with itself.

On the one hand, the cases in which an informer entitled to a part of the penalty on a conviction before a justice of the peace, has been held incompetent; those in which the party injured is said to be competent in support of an indictment for perjury, *because* he cannot avail himself of the conviction obtained by his own testimony; and those in which a party who would be liable on an instrument, supposing it genuine, has been held incompetent to show it forged, because he was supposed to have an interest in the conviction; all go to show that interest, in the event of a criminal proceeding, disqualifies a witness.

On the other hand, there are cases in which the most direct interest does not render the witness incompetent. A prosecutor, entitled to a reward on conviction, has always been admitted as a witness. With respect to the owners of goods which have been stolen, and who are competent witnesses, though entitled to the restitution of the stolen goods: it seems that where the goods have not been sold in market *overt*, and the property therefore still remains in the owners, the conviction only gives them a writ of restitution under the statute of 21 Hen. 8. c. 11. In addition to the proceedings by action of trespass, trover, or detinue, at common law, by which they might recover the property or its value; and, as in support of the statutable proceeding it is necessary to show all the facts which would support an action at common law, and the conviction also; it does not appear that the owner has any substantial interest in the event of the cause. (a) Where the goods have been sold in market *overt*, the case is very different; the plaintiff has a direct interest in the conviction, which makes an essential part of his title to recover, whether in a proceeding by

a) For the pleadings in an action commenced by writ of restitution, see *Trenaine's Pleas of the Crown*, p. 315.

writ of restitution or otherwise. The competency, however, of a party robbed, in either case follows, necessarily from the words of the statute of 21 H. 8. c. 11. which directs, that justices "afore whom any felon or felons who have robbed or taken away any money, goods, or chattels, from any of the king's subjects, from their person or otherwise, shall be found guilty or otherwise attainted, by reason of evidence given by the party so robbed, or owner, or by any other, by their procurement have power by the said act to award from time to time, writs of restitution for the said money, goods, and chattels, in like manner as though any such felon or felons were attainted at the suit of the party in appeal."

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Rex

v.

BEAVAN.

CASES
ARGUED AND DECIDED
AT NISI PRIUS,
IN K. B.

AT THE SITTING IN
EASTER TERM,
6 GEO. IV. 1825.

FIRST SITTING IN TERM AT WESTMINSTER.

WESTMINSTER,
April 28, 1825.

AMFIELD v. WHITE.

A tenant verbally agreed "to pay all taxes." Held, that under this agreement he was bound to pay the land-tax although it was not specifically mentioned.

ASSUMPSIT for use and occupation. Plea, general issue and tender.

A witness proved a verbal agreement between the plaintiff and defendant, that the defendant should pay 10*l.* rent *and all taxes*.

Hutchinson for the defendant, contended that under this agreement the tenant was to pay all taxes usually paid by tenants, or to which they were liable, but that the defendant was not liable to pay the land-tax, and consequently was entitled to

deduct from the rent whatever land-tax he had been obliged to pay.

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AMFIELD

v.

WHITE.

BAYLEY J. I am of opinion that the words "*all taxes*," comprehend in this case the land-tax, although it be not specially mentioned. (a)

Verdict for the plaintiff.

E. Lawes for the plaintiff.

Hutchinson for the defendant.

(a) By the general land-tax act (38 Geo. 3. c. 5. s. 17.), "the tenant of all houses, lands, tenements, and hereditaments, which shall be rated by virtue thereof, are required and authorised to pay such sum or sums of money as shall be rated upon such houses, &c. and to deduct out of the rent so much of the said rate as in respect of the said rents of any such houses, &c. the landlord should, or ought to pay and bear. And the landlords, both mediate and immediate, according to their respective interests, are required to allow such deductions and payments, upon the receipt of the residue of the rents." *Vide Brewster v. Kidgill*, 12 Mod. 166. S.C. Ld. Raym. 317. *Giles v. Hooper*, Carth. 135. *Hopwood v. Barefoot*, 11 Mod. 238. *Count of Arran v. Crisp*, 12 Mod. 54. *Bradbury v. Wright*, Dougl. 624. *Cranston v. Clarke*, Sayer, 78.

CASES

ARGUED AND DECIDED

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AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

EASTER TERM,

6 GEO. IV. 1825.

ADJOURNED SITTINGS IN LONDON.

MANN *v.* MOORS.

GUILDHALL,
May 25.

ACTION, on a bill of exchange, by the indorsee against the drawer.

The bill, as drawn, was dated *Manchester*, and upon being presented for payment at the acceptor's in *London*, was dishonoured. The only evidence given, of notice to the defendant, of the bill having been dishonoured, was, that a letter, containing such a notice, had been put into the

letter, containing such notice, had been put into the post-office in *London*, directed to him "*Manchester*."

In an action against the drawer of a bill of exchange, dated "*Manchester*:" Held, that it was sufficient evidence of his having had notice of its dishonour, to prove that a

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MANN

v.

MOORS.

post-office in *London*, directed to "Mr. *Moors*,
Manchester."

Wightman for the defendant, contended, that this was not a sufficient notice of the dishonour of the bill; that it was the duty of the plaintiff to have enquired of the prior holders of the bill the particular address of the defendant in the town of *Manchester*; that it was most likely a letter so directed, to so large a town as *Manchester*, would not reach the defendant.

ABBOTT Ld. C.J. I am of opinion, that this was sufficient notice of the dishonour of the bill. If the drawer of a bill of exchange dates his bill *London*, I think a notice of dishonour by letter addressed to him *London*, will be sufficient.

Verdict for the plaintiff. (a)

Gurney and Hutchinson for the plaintiff.
Wightman for the defendant.

(a) In *Walker v. Haynes*, *supra*, 149. Abbott Ld. C. J. held, that "Mr. *Haynes*, *Bristol*," was too general a direction to raise a presumption that the letter reached the particular individual intended; but that case is very distinguishable from the present; that was an action by an indorsee against the indorser; here the action is against the drawer, who designates on the face of the bill itself the place where it is drawn, furnishing thereby presumptive evidence that notice of the dishonour of the bill will reach him at that place.

1825.

JENNINGS v. THROGMORTON.

GUILDHALL,
May 25.

ASSUMPSIT for use and occupation of certain rooms, belonging to the plaintiff.

The defence set up was, that the rooms were let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact.

It did not appear, from the evidence produced in support of the defence, that the plaintiff, at the time of letting the rooms to the defendant, was aware of her mode of life; but it was proved, that after the defendant had occupied the rooms for about two months, the plaintiff was fully informed of the defendant's receiving male visitors there, and that she supported herself by prostitution. It was shewn that the defendant was a weekly tenant.

In an action for use and occupation of a lodging under a weekly tenancy, where it did not appear that the lodging was originally let for the purposes of prostitution: Held, that the plaintiff could not recover the weekly rent, which accrued after he was fully informed, that the defendant occupied the lodgings for the purposes of prostitution.

ABBOTT Ld. C.J. There are two questions for your consideration, First, you are to consider, whether the plaintiff originally let these lodgings to the defendant for the purposes of prostitution; and if you should be of opinion that he did, then your verdict should be for the defendant. Secondly, if you should be of opinion that the plaintiff was not originally aware of the defendant's course of life, and the purpose to which these lodgings were to be applied, you are to consider whether he allowed her to remain as his weekly tenant, after he had become acquainted with her mode of life.

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JENNINGS
v.
THROGMOR-
TON.

I am of opinion, that if the plaintiff, after he became acquainted with her mode of living, suffered her to occupy the premises for the express purpose of continuing a life of prostitution, and the present demand accrued after he had acquired this knowledge of her character, that he is not entitled to recover, and that your verdict should be for the defendant.

Verdict for the defendant. (a)

Thesiger for the plaintiff.

Denman C. S. for the defendant.

(a) See *Crisp v. Churchill*, cited in *Lloyd v. Johnson*, 1 B. & P. 340, *Girardy v. Richardson*, 1 Esp. N. P. C. 13.

GUILDHALL,
May 27.

REX v. SOLOMON.

On an indictment for perjury alleged to have been committed by the defendant as a witness in a civil action, it appeared that the evidence given on that trial by the defendant, contained all the matter charged as

THIS was an indictment for perjury, alleged to have been committed by *Solomon*, as a witness for the defence, in a case of *Cohen v. Davies*, tried in the Court of Common Pleas. That was an action of assault and battery, with a plea of *son assault demesne*.

The indictment charged *Solomon*, with having sworn, that *Cohen* spit in *Davies's* face before *Davies* struck him, and that he, *Solomon*, had not said perjury, but other statements, not varying the sense, intervened between the matters set out: Held to be no variance, although in the indictment the evidence appeared to have been given continuously.

to *Davies*, “*Give it him, give it him, it will go in one account,*” — and assigned perjury on both statements.

1825.
 REX
 v.
 SOLOMON.

The evidence given by the defendant on the former trial, contained all the matter charged as perjury: but other matter intervened between the statement, as to the spitting, and that as to the words.

Denman C.S. and *Platt* objected that this was a fatal variance; as the evidence, charged as perjury, in the indictment appeared to have been given continuously.

ABBOTT Ld. C.J. It is immaterial: what intervenes does not vary the effect of what is stated. This is not like the case of a libel, where something of the kind suggested has been held, but whether rightly or not it is not necessary for me at present to determine.

The defendant was acquitted. (a)

Gurney and *Chitty* for the prosecution.

Denman C.S. and *Platt* for the defendant.

(a) *Tabart v. Tipper*, 1 Campb. 350. *Bell v. Byrne*, 13 East, 554. *Rex v. Taylor*, 1 Campb. 404. *Cartwright v. Wright*, 5 B. & A. 615. *Cooke v. Hughes*, *supra*, 112. 1 Stark. Crim. Plea. 117. 1st edit.

1825.

 ADJOURNED SITTINGS AT WESTMINSTER.

 WESTMINSTER,
 May 31.

BROWNE v. MURRAY.

In an action for a libel, where the general issue is pleaded, and also special pleas in justification, the plaintiff may, in the outset, give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant, but he is not entitled to give part of such evidence in the first instance, and to reserve the remainder for reply to the defendant's case.

THIS was an action for a libel. The defendant pleaded the general issue, and several pleas of justification.

The plaintiff, after proving the publication of the libel by the defendant, called a witness to disprove certain facts alleged in the justification. The defendant then proceeded with evidence in support of his pleas. After the defendant had closed his case, the plaintiff proposed to call another witness to disprove other facts stated in the justification.

The *Attorney General*, on the part of the defendant, objected to such evidence being received.

ABBOTT Ld. C. J. In actions of this nature, the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant. But if the plaintiff in the outset, thinks fit to call any evidence to repel the justification, then, I am of opinion, that he should go through *all* the evidence he proposes to give for that purpose, and that he shall not be permitted to give further evidence in reply. It is much more con-

venient for the due administration of justice that this course should be adopted, otherwise there will be no end to evidence on either side, as the defendant would be entitled again to call witnesses to answer those last produced by the plaintiff to rebut the justification.

1825.
BROWN
v.
MORRIS.

Denman C. S., F. Pollock and Brougham for the plaintiff.

The *Attorney-General* and *J. Parke* for the defendant.

In *Sylvester v. Hall*, *Middlesex* Sittings after *Trinity* Term, 7th July 1825, which was an action of trespass and false imprisonment, with the general issue, and pleas in justification, *Abbott* Ld. C. J. laid down the same rule as in the principal case.

In *Rees v. Smith*, 2 Stark. N. P. C. 31., which was an action of trespass, for breaking and entering a dwelling-house, and seizing goods, with the general issue, and pleas in justification, Lord *Ellenborough* states that the general rule was, that "when by pleading, or by means of notice, the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts; that when it is known what the question in issue is, it must be met at once." And the practice before his Lordship in cases of bills of exchange, where notice of intention to dispute the consideration had been given, accorded with this rule. *Delauney v. Mitchell*, 1 Stark. N. P. C. 439. But a different practice, in actions of this nature, has prevailed under the present Lord Chief Justice, who has always allowed evidence to be given in reply to that of the defendant, impeaching the consideration, provided no suspicion has been cast on the plaintiff's title by cross-examination of his witnesses. *Chitty on Bills*, 6th edit. 401. *Phillips on Evidence*, 6th edit. vol. ii. p. 17. *Starkie on Evidence*, pt. iii. p. 383. n. (a). And the present practice in the

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v.
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Common Pleas agrees with that of the King's Bench, though it was otherwise ruled in *Spooner v. Gardiner*, *supra*, 86. It would seem that the option given in the principal case, would only apply where the plaintiff's case consisted of one transaction, and the defendant's justification of another distinct one, as in libel; but where there is only one transaction in question between the parties, as in assault and battery, with plea of *son assault demesne*, it would not be allowed a plaintiff to give in reply any evidence applicable to that transaction.

CASES

ARGUED AND DECIDED

1825.

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

EASTER TERM,

6 GEO. IV. 1825.

ADJOURNED SITTINGS IN LONDON.

SMITH v. BLANDY and Another.

GUILDHALL,
May 31.

ASSUMPSIT for goods and sold and delivered.

A *prima facie* case having been made out for the plaintiff, by proof of the delivery of a large quantity of timber, and of the value thereof;

Wilde Serjt., for the defendants, cross-examined one of the plaintiff's witnesses, who proved that he

that the goods were sold under a written contract, which he produced to the witness: Held, that the written contract spoken of was evidence for the plaintiff, without calling the broker, by whom it purported to have been made and signed.

The assertion of a party, in a conversation given in evidence against him, of facts in his favour, is *evidence* for him of those facts.

Where by the cross-examination of the plaintiff's witness, who had proved a *prima facie* case of the sale of goods, it appeared that the plaintiff had said

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SMITH

v.

BLANDY.

had heard the plaintiff say, that the timber was sold under a written contract, which the plaintiff at the same time showed the witness.

Pell Serjt. then produced a broker's note, which the witness said, was the paper spoken of by the plaintiff.

Wilde Serjt. objected to the paper being received as evidence of the contract, unless the broker was called to prove it. That what the plaintiff said was proof against him that the goods were sold under a written contract; but that his assertion in his own favour, though made at the same time, could not be taken as true, so as to relieve him from the necessity of proving the written instrument. And he cited *Remmie v. Hall*, Manning's Index, 2d edit. p. 376.

For the plaintiff it was answered, that the whole conversation was evidence to go to the jury; and a case tried at *Winchester* (a) before *Abbott* Ld. C.J. was mentioned, in which a party's declarations had been given in evidence against him, and his Lordship left the whole conversation, to the jury to consider, whether the facts asserted by the party, in his own favour were not true, as well as those against him.

BEST C. J. I agree with the case just stated, which seems perfectly consistent with the account

(a) *Cray v. Halls*, Summer Assizes 1824, *ex relatione* *Moody*.

given of *Rennie v. Hall*. The whole of what a party says at the same time, must be given in evidence, and what he says in his favour must not be taken as true, but must be left, under all the circumstances, for the jury to say whether they believe it or not. I think this paper must be left to the jury without further proof. (a)

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SMITH
v.
BLANDY.

The following contract was put in : —

“ London, 29d June 1824.

“ Sold, for account of Mr. John Smith, to Messrs. Blandy and Palmer, of Reading, ex Elizabeth, a Memel, Commercial Docks, all the yellow plank at 18*l.* per standard hundred ; all the timber at 5*l.* 2*s.* 6*d.* per load, say 5 floats. To be taken by the dock account, and paid for in cash, allowing 2½ per cent. discount, within fourteen days from this date.

“ The above goods will be taken on board and the duty deducted.

“ J. Marsh, broker.”

(a) In Eq. Cas. Abr. 10. it is laid down, that “ where a man is charged only by an oath, or a book, the same should be his discharge.” But in *Thompson v. Lambe*, 7 Ves. 588., the rule is thus qualified by the Lord Chancellor : — “ A person charged by his answer, cannot by his answer discharge himself ; nor even by his examination, unless it is in this way : if the answer or examination states, that upon a particular day, he received a sum of money, and paid it over, that may discharge him ; but if he says, that on a particular day, he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge ; for it is a different transaction.” See *dgeway v. Darwin*, 7 Ves. 404.

1825.

SMITH

v.

BLANDY.

Where goods were sold under a written contract at so much per load, "to be taken by the dock account, and paid for in cash, allowing 2½ per cent. discount within 14 days from the date; the goods to be taken on board, and the duty deducted;" and the duty was payable by the buyer: Held, that the discount was to be calculated on the sum to be received by the seller only, exclusive of the duty.

The construction of a mercantile contract is matter for the jury.

It appeared by the evidence of the broker who was called for the defendants, that the price of the whole timber, calculated on the terms stated, which included the duty, was 1301*l.* 3*s.* 3*d.* The duty on the whole was 555*l.* 10*s.* 8*d.*, and must be paid at the docks before the timber is taken out for use. The whole of it was paid by the defendants, and no part had ever been advanced, or paid by the plaintiff. The contest in the cause was, whether under the contract stated, the discount must be calculated on the whole sum, including the duty, viz. 1301*l.* 3*s.* 3*d.*, or on the sum to be received by the plaintiff as purchase-money only, viz. 745*l.* 12*s.* 7*d.* The defendants had paid the purchase money, deducting discount on the whole sum, the difference being 15*l.* No usage was proved on either side. Brokerage on the whole sum was charged and paid.

BEST C. J., in summing up to the jury, said: The defence reduces itself to the construction of this instrument independent of usage; and the question upon it is, whether the plaintiff is to be charged discount on the money to be paid to government, as well as on that to be received by himself. The plaintiff himself could never receive more than 745*l.* 12*s.* 7*d.*, and it is for you to say whether this discount is chargeable on that sum only, or on the additional sum which the plaintiff never received.

Verdict for the plaintiff 15*l.*

Pell Serjt. and *Campbell* for the plaintiff.

Wilde Serjt. and *Talfourd* for the defendants.

In *Trinity* term following *Wilde* Serjt. moved for a new trial, on the ground that the contract, on the face of it, imported that the discount should be calculated on the whole sum, and that the jury ought to have been so directed; and he cited *Johnson v. Sheddon*, 2 *East*, 584, where *Lawrence J.*, in giving judgment, says: "The price of a thing is what it costs a man; and if, in addition to a sum to be paid before the mast, other charges are to be borne, that sum, and the charges, constitute the cost. It is not necessary that the whole price should be paid to one person."

But the Court refused the rule, and, *per Curiam*, the contract, being a mercantile instrument, was properly left to the jury, and they have put the right construction on it.

1825.

SMITH

v.

BLANDY.

CASES

ARGUED AND DECIDED

1825.

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

TRINITY TERM,

6 GEO. IV. 1825.

FIRST SITTINGS AFTER TERM IN LONDON.

GUILDHALL,
June 23.

FENTON, Gent., one, &c., v. CORREA.

In an action on an attorney's bill: Held, that searching at the judgment office to ascertain whether satisfaction had been entered on the roll in an action between A. and B.; and also whether issue

had been entered in such action; also whether issue had been docketted in such action, were not taxable items within the 2 G. 2. c. 23. s. 23.

THIS was an action upon an attorney's bill. The bill contained, amongst other charges not taxable, the four following items:—"Attending searching at the judgment office to ascertain whether satisfaction had been entered on the roll in the above-mentioned cause, *Madrazo v. Wilks*, (above two hours,) 13s. 4d."—"Paid search, 3s. 4d."—"Not being able to obtain any information from Mr. *Mitchell*, attending again to search when issue

entered in the action against *Wilks*, but could not find any entry, 10s. 0d.” — “ Paid search, 1s. 6d.” — “ Attending again to search if issue had been docketted in the year 1819, could not find that it had, 6s. 8d.” — “ Paid search, 1s. 6d.” — “ Attending to search if the issue in *Madrazo*’s bills was docketted in 1817, or 1818, 6s. 8d.” — “ Paid search, 2s. 4d.”

1825.
FENTON
v.
CORREA.

Scarlett for the defendant, contended that the plaintiff must be nonsuited ; that these items were taxable, and made it incumbent on the plaintiff to have complied with the provisions of the 2 G. 2. c. 23. s. 23., by delivering his bill signed, to the defendant, a month previous to the commencement of the suit.

ABBOTT Ld. C. J. I am of opinion that these are not taxable items ; I have no doubt whatever upon the subject, and you have already had the same opinion from another of the Judges of the Court from whence this record issues.

Verdict for the plaintiff. (a)

Gurney and *F. Pollock* for the plaintiff.
Scarlett and *Rotch* for the defendant.

(a) *Winter v. Payne*, 6 T. R. 645. *Sandom v. Bourne*, 4 Campb. 68. *Weld v. Crawford*, 2 Stark. N. P. C. 538. *Wilson v. Gutteridge*, 3 B. & C. 157. *Smith v. Wattleworth*, 4 B. & C. 364.

1825.

GUILDHALL,
June 25.BARNES *v.* LUCAS and Another.

In an action against the sheriff for taking insufficient sureties in replevin, if the sheriff has assigned the replevin bond to the plaintiff, it is unnecessary to prove the execution of the sureties, though averred in the declaration.

ACTION against the sheriff for taking insufficient sureties in replevin.

The declaration averred the execution of the replevin bond by the sureties. No evidence was given by the plaintiff, of the execution of the replevin bond by the sureties, but it was proved that the bond had been assigned by the sheriff to the plaintiff.

Holt for the defendant, submitted that it was incumbent in this case, on the plaintiff to prove the execution of the bond by the sureties, as that fact was averred in the declaration.

Scarlett for the plaintiff, contended that proof of the assignment by the sheriff to the plaintiff was sufficient, and admitted the execution of the sureties.

ABBOTT *Ld. C. J.* I am of opinion, that it is not necessary for the plaintiff to prove the execution of the sureties in this replevin bond, I think that, as against the sheriff, proof of the assignment by him to the plaintiff is sufficient.

Verdict for the plaintiff. (*a*)

Scarlett and *Comyn* for the plaintiff.

Holt for the defendant.

(*a*) And see *Scott v. Waithman*, 3 Stark. N. P. C. 168. cited Starkie's Evidence, part iv. p. 1351.; 2 Phillipps' Evidence, 273. 6th edit.

1825.

BOLTON and Another, Assignees, &c. v.
JAGER and Another.

GUILDHALL,
June 25.

THIS was an action of *assumpsit*, on the common money counts, brought by the plaintiffs as assignees, to recover the amount of several sums of money, paid by a bankrupt, subsequently to an act of bankruptcy.

Payment by weekly instalments in discharge of a debt for goods sold to the bankrupt, is not a payment "in the usual and ordinary course of trade and dealing," so as to be protected by the 19 G. 2. c. 32. s. 1.

It appeared, that the bankrupt being indebted to the defendants in a large sum of money for goods sold, agreed to pay 3*l.* *per* week till the debt should be discharged; the plaintiffs sought to recover in this action, the amount of several of these weekly instalments paid by the bankrupt, after an act of bankruptcy.

The defendants contended, that the payments were protected by the statute 19 G. 2. c. 32. s. 1.; they having no knowledge at the time of such payments that the debtor had committed an act of bankruptcy, or that he was in insolvent circumstances.

ABBOTT Ld. C. J. was clearly of opinion that the payments of such instalments were not payments "in the usual and ordinary course of trade and dealing," and, consequently, were not within the protection of the act of parliament.

Verdict for the plaintiffs. (a)

(a) By the 6 Geo. 4. c. 16. s. 82., it is enacted, "That all payments really and *bonâ fide* made, or which shall hereafter be

1825.

BOLTON

v.

JAGER.

Gurney and Talfourd for the plaintiffs.
Scarlett and Platt for the defendants.

made by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed."

FIRST SITTINGS AFTER TERM AT WESTMINSTER.

Westminster,
 June 23.

SHELDON v. WHITTAKER and Another.

In an action against the sheriff on the 8 Ann. c. 14. for taking goods off the premises without paying rent, the declaration stated, that the sheriff, "by virtue of, and under pretence of a certain writ of our said lord the king before the king himself, before that time sued forth, &c. took the goods," &c. The writ under which the goods were seized issued from the Common Pleas: Held, a fatal variance.

THIS was an action against the sheriff on the 8 Ann. c. 14. for taking goods seized under a *fi. fa.* off the premises, without first paying half a year's rent then in arrear to the plaintiff.

In the declaration it was stated, that "they the said defendants then being sheriff of the said county, by virtue of and under pretence of a certain writ of our said lord the king, called a *feri facias*, against the said *Joseph Robinson Smith*, at the suit of *Edward Mayers*, out of the court of our said lord the king, before the king himself, before that time sued forth and prosecuted, directed to, &c., took the goods and chattels, &c., of the said *Joseph Robinson Smith*."

The writ of *fi. fa.* under which the goods were seized, issued from the Court of Common Pleas.

Scarlett for the defendants, submitted that this was a fatal variance, and that the plaintiff must be nonsuited.

AFTER TRINITY TERM, 6 GEORGE IV.

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Gurney and *Holt* for the plaintiff. The substance of the allegation has been proved; namely, that a writ of *fi. fa.* did issue; the sheriff has equally neglected his duty, whether such writ issued from the Common Pleas or King's Bench. They contended that this was similar to the case of *Stoddart v. Palmer*, 3 B. & C. 2., where a judgment was stated in the declaration to be of one term, and the production of the record shewed it to be of another, and yet it was held to be no variance.

1825.
SHELDON
v.
WHITTAKER.

ABBOTT Ld. C.J. I am of opinion that this is a fatal variance, and that the plaintiff must be nonsuited. If there were any authority to shew, that where a judgment is stated in the declaration to be in the King's Bench, it is sufficient to prove in support of that allegation, a judgment in the Common Pleas, then, indeed, it might be contended, that such an authority would govern the present case; but *Stoddart v. Palmer* by no means goes to that extent.

Nonsuit.

Gurney and *Holt* for the plaintiff.
Scarlett for the defendants.

In the following *Michaelmas* term, *Gurney* moved to set aside this nonsuit, but the Court refused the rule.

1825.

WIMMOT,
July 2.

EDWARDS v. ETHERINGTON.

A tenant of a house from year to year, not under any agreement to repair, may quit, without previous notice to his landlord, on the premises becoming unsafe and useless from want of repairs; and such tenant is not liable, in an action for use and occupation, for any rent after the occupation has ceased to be beneficial.

ASSUMPSIT for use and occupation.

The defendant, was tenant from year to year, of a dwelling-house in *Wimot Street*, at the rent of 65*l.* a year, under the plaintiff, who held under a lease from one *Sutton*, at the same rent. The lease was not produced at the trial.

It appeared that the walls of the house were in such a dilapidated state, that it became unsafe to reside in it, and the lodgers all quitted for that reason. Workmen were sent by *Sutton* to repair the party-wall, which was taken partly down on the basement story, and repaired. The defendant quitted a few days after the *Midsummer-day* (the rent being payable at the usual quarter days), and after the workmen had quitted the premises. He sent the key to the plaintiff's house immediately. The plaintiff was at that time absent from *London*, but returned about three weeks afterwards, and soon after *Michaelmas* following endeavoured to let the house, and sent persons with the key to show the premises. It was let from the following *Christmas*, the new tenant paying no rent for the first half year, on condition of putting the premises in repair. No notice to quit before *Christmas* had been given, and the plaintiff's demand was for rent from *Midsummer* to *Christmas* 1824. The plaintiff had paid rent to *Sutton* for that half year.

The defence was, that the plaintiff had accepted the surrender of the defendant, by taking and

using the key, and if not, that the plaintiff could not claim compensation for premises utterly useless to the defendant.

1825.
EDWARDS
v.
ETTERING-
TON.

ABBOTT Ld. C.J., in summing up, observed; the general rule of law undoubtedly is, that a yearly tenant cannot quit in the middle of a quarter or half year, without giving proper notice to his landlord; if he does so quit, he remains liable for rent, in this form of action; but that rule, is not so peremptory, as not to bend to particular circumstances. Slight circumstances will not suffice, but such serious reasons may exist, as will justify a tenant in quitting at any time, and it is for you to say whether in this case any such exist. If the acceptance of the surrender had been made out, by clear evidence, the case would have been free from difficulty, but it does not appear that the plaintiff either acquiesced, or refused, until after *Michaelmas*. It is for you to say whether such serious reasons for quitting, existed in this case, as will exempt the defendant from this demand, on the ground of his having had no beneficial use and occupation of these premises; and that, through no default of his own, but through the fault of a person (the plaintiff) who ought to have taken care, that the premises should have been in such a state, as to continue useful to the defendant. If you think there was not, your verdict must be for one quarter only; the plaintiff might by his lease have been bound to repair, the defendant was under no such obligation.

Verdict for the defendant. (a)

(a) See *Baker v. Holcroft*, 4 Taunt. 45.

1825.
EDWARDS
v.
FATHERING-
TON.

Thesiger for the plaintiff.
Platt for the defendant.

In the following term *Thesiger* moved for a new trial, but the Court refused the rule on the ground that the defendant had not had any beneficial occupation of the premises after *Midsummer*.

WARRINGTON,
July 7.

REX v. GRANT and Others.

Keeping a public gaming house is not an infamous crime, so as to render a person convicted thereof incompetent as a witness.

THIS was an indictment for a conspiracy.

A witness was called in support of the prosecution, who had been convicted of keeping a public gaming house.

Denman C. S., and *Brougham*, for the defendants, objected to the competency of the witness, and cited *Clancey's* case, *Fortescue's* Rep. 208.

ABBOTT Ld. C. J. Not having any authority to show this witness to be incompetent, I think I am bound to receive his evidence. (a)

Guilty.

The *Attorney General* and *Adolphus* for the prosecution.

Denman C. S. and *Brougham* for the defendants.

(a) See Co. Litt. 6. 2 Hawk. c. 46. s. 19. Starkie's Evidence, pt. iv. p. 715.

1825.

ADJOURNED SITTINGS IN LONDON.

BOLLAND and Others, Assignees, &c., v.
BYGRAVE.GUILDHALL,
October 20.

THIS was an action by the assignees of *Marsh, Stracey, and Co.*, bankrupts, on a bill of exchange for 337*l.* 18*s.* drawn by a person named *Hale*, payable three months after date to his own order, upon and accepted by the defendant. The bill, which was accepted for the accommodation of *Hale*, was indorsed by him, and also by Mr. *Dejean*, as the agent of *Tauernier*, a gentleman residing in *France*, and was found in the possession of the bankrupts, (who were bankers,) at the time of their stoppage.

The counsel for the plaintiffs, after proving the hand-writing of the acceptor and indorsers, gave evidence, in the first instance, of the circumstances under which the bankrupts became possessed of the bill. For this purpose they produced a ledger containing an entry in the hand-writing of Mr. *Fauntleroy*, one of the bankrupts, since dead, purporting to be made on the 9th *September* 1824, the day before Mr. *Fauntleroy* was taken up on a charge of felony. By that entry this bill and several others, amounting in the whole to 4420*l.* 14*s.* 1*d.*, were stated to be discounted by the firm on behalf of Mr. *Tauernier*, and the proceeds taken to his credit. It was further proved that *Tauernier* was a customer of the bankrupts, and was in the habit

A banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer, which may come to his hands, and may put the same in suit.

And even where taking into account the bills on both sides, the customer has a balance in his favour of a sum not equal to the amount of any one of them, this surplus cannot be appropriated to any one of the bills, in reduction of the claim of the banker suing any of the parties to the bill.

1825.

BOLLAND

v.

BYGRAVE.

of procuring bills to be discounted by them through his agent, Mr. *Dejeam*, though he sometimes deposited bills with them merely for safe custody. The bankrupts had before this time discounted bills for *Tauernier*, which were then unpaid, and for the proceeds of which he was a debtor at the time, some of the bills remaining in their hands, and others having been paid away. They had also accepted a bill for his accommodation of 1879*l.* 16*s.*, which was then unpaid. Taking out all these bills on the one side, and the bills so taken to account by *Fauntleroy* on the other, upon the 9th of *September*, there would be a balance of about 100*l.* in favour of *Tauernier*, who had since set off the proceeds of the bills, against the claims of the assignees upon him.

Gurney for the defendant, submitted that upon the facts disclosed, the plaintiffs must be nonsuited. At present it was quite uncertain, as Mr. *Dejeam* had not been called, for what purpose this bill was deposited in the hands of the bankers; and the mere voluntary act of Mr. *Fauntleroy* in taking the bill to account as discounted, and crediting the customer with the proceeds, could vest no property in the bankrupts, nor, consequently, in their assignees.

ABBOTT Ld. C. J. If the right of the plaintiffs to recover depended on the question whether authority was given, on the part of *Tauernier*, to the bankrupts to discount this bill, I should think, as the case now stands, that I ought to

direct the jury to find, as a question of fact, whether this bill was delivered at the bank to be discounted, or to be kept for safe custody. But I am of opinion that the right of the plaintiffs to recover, rests on other and independent grounds. It appears that, at this time, the bankrupts had discounted bills for *Tauernier* to a large amount, which were still unpaid; that they had also accepted a bill for his accommodation to a large amount not then due; and I think that a banker, who stands in this relation to a customer, has a lien upon any securities of that customer which may, for any purpose, be placed in his hands; and he has a right to retain them to countervail the liabilities he has so incurred on his behalf, till those liabilities have ceased. It is true that taking out the bills on both sides there will remain a balance of about 100*l.* in *Tauernier's* favor; but I cannot say that any one acceptance in particular shall have the benefit of this surplus. With whatever view, therefore, this bill was delivered to Mr. *Fauptleroy*, I am of opinion that, in the subsisting state of the accounts, the bankrupts had a right to retain it, and that their assignees are entitled to recover.

1825.
BOLLAND
v.
BYGRAVE.

Gurney, in order to raise the question upon this ruling, called Mr. *Dejean*, the agent of *Tauernier*, to prove that the bills were deposited merely for safe custody; but the witness proved, on the contrary, that they were delivered to him, in the ordinary course of his employment at the bank, to be discounted.

1825.
 BOLLAND
 v.
 BYGRAVE.

The jury accordingly returned a verdict for the plaintiffs. (a)

Scarlett and Comyn for the plaintiffs.
Gurney and J. Parke for the defendant.

(a) *Jourdaine v. Lefevre*, 1 Esp. N. P. C. 66. *Davis v. Bowsher*, 5 T. R. 488. *Scott v. Franklin*, 15 East, 428. *Bosanquet v. Dudman*, 1 Stark. N. P. C. 1.

GUILDHALL,
 October 25.

ROBINSON v. WARD.

If an attorney pays into his bankers, money of his clients, mixing it with his own, and the bankers fail, the attorney is liable to make good the loss.

ASSUMPSIT.

This action was brought to recover the sum of 5136*l.* which the plaintiff had lost through the negligence of the defendant.

It appeared that the plaintiff had employed the defendant as his attorney in the sale of an estate, in which character the defendant on the 21st of August 1824 received from the vendor of the estate the purchase money, viz. the sum of 5900*l.*

The defendant was authorised to deduct from the purchase-money, all law charges, connected with the sale, as well as the charges of a Mr. *Causfield*, a surveyor and land agent, who had also been concerned for the plaintiff in this sale. The residue of the purchase-money, after deducting these charges, was to be laid out in the purchase of three *per cent.* consolidated bank annuities,

in the names of one *Henry James Parsons* and the plaintiff, upon the trusts of a deed executed on the 27th of *December* 1823.

1825.
ROBINSON
v.
WARD.

In a day or two after the defendant received the purchase-money, he sent to Mr. *Caufield* to ascertain the amount of his bill. In consequence of which, Mr. *Caufield* on the 28th of *August* delivered to the defendant *two* bills, one of which the defendant immediately paid, the other appearing to be for business done relative to the same estate, but commencing in *June* 1822, and ending before the contract for the sale, the defendant did not conceive himself authorised to pay without the sanction of the plaintiff, and therefore desired Mr. *Caufield* to write to the plaintiff for his authority.

On the same day, the defendant not thinking it safe to keep so large a sum in his house, paid the 5300*l.* in the identical notes he had received from the purchaser, together with 116*l.* 9*s.* 11*d.* of his own money, to his own private account, at the banking-house of Messrs. *Marsh* and Co. On the 3d of *September* the defendant received a letter from the plaintiff, authorising him to pay the remaining bill of Mr. *Caufield's*. On the 9th of *September* Mr. *Caufield* called on the defendant, when the latter informed him that he was instructed to discharge his bill, and on *Friday* the 10th, at four o'clock in the evening, the defendant paid Mr. *Caufield* his bill. The 10th was not a transfer day at the Bank. On *Saturday*, the 11th, Messrs. *Marsh* and Co. stopped payment. At the time Messrs. *Marsh* and Co. stopped payment, the defendant's balance in their hands, inclusive of the 5300*l.*, amounted to 6905*l.* 19*s.* 8*d.*

1825.
 ROBINSON
 v.
 WARD.

Scarlett submitted, that upon this evidence it did not appear, that the defendant had been guilty of any negligence; that if the defendant had paid the money, into the bankers in the plaintiff's name, the consequence would have been the same, and, therefore, the plaintiff could not allege that he had sustained any loss on that account, *Knight v. Lord Plymouth*, 3 Atk. 480., *Rowth v. Howell*, 3 Ves. 565., and *Adams v. Claxton*, 6 Ves. 226. are authorities in favour of the defendant. If, instead of paying the money into his bankers, the defendant had kept it in his own desk, and the desk had been broken open by thieves and the money taken out, he apprehended the defendant would not be answerable, as he was not bound to take more care of it than of his own property, *Jones v. Lewis*, 2 Ves. 240.

The *Attorney-General* contended, that the defendant by paying this money into the house of *Marsh and Co. in his own name*, had become answerable to the plaintiff for the loss.

ABBOTT Ld. C.J. I have no doubt of the defendant's liability. There are three modes which a person circumstanced as the defendant may adopt; First, he may keep the money in his own house; as to the consequences of robbery by force in such a case, I express no opinion, but we are all aware of the consequences of a private theft (a);

(a) An attorney, who receives the money or goods of his client, would be answerable for any loss happening through his


Secondly, he may pay the money into his bankers in his own name, to be placed to his own credit; Thirdly, he may pay it in his own name, and at the same time open a separate account, which would specify on what account the money was paid. Thus, if the money had been paid into the house of *Marsh and Co.* in the defendant's name, but on account of *Mr. Robinson's estate*, this, in the words of Lord *Hardwicke*, would have "*ear-marked it*," and the money, in case of the death of the defendant, would have been forthcoming. But if a person mixes up money, which he has thus received on account of a third person, with his own, he makes himself debtor to the estate out of which the money arose. This is a hard case upon *Mr. Ward*, upon whose conduct not the slightest suspicion can rest, but, in point of law, I am of opinion he is answerable to the plaintiff.

1825.
ROBINSON
v.
WARD.

Verdict for the plaintiff. (a)

negligence or want of ordinary diligence. Generally speaking, a loss by *stealth* would be evidence of want of ordinary diligence. Jones on Bailment, 44, 76. Whereas a loss by *robbery*, unless occasioned by the bailees needlessly risking the property, would furnish no such inference. Jones on Bailment, 44. 66. 68. 76. Abbot on Shipping, 234. n. l., and the authorities there cited from the civil law; 12 Ves. 240., and per Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 918. "And though a bailee is to have a reward for his management, yet he is only to do the best he can; and if he be robbed, &c. it is a good account. See *Finucane v. Small*, 1 Esp. N. P. C. 315.

(a) *Vide Wren v. Kerton*, 11 Ves. 377. *Rocke v. Hart*, 11 Ves. 60. *Massey v. Banner*, 4 Madd. 413. S. C. confirmed on appeal by the Lord Chancellor, 1 Jac. & Walk. 241.

1825.

 ROBINSON
 v.
 WARD.

The *Attorney-General, Bolland and Law* for the plaintiff.

Scarlett and Comyn for the defendant.

GUILDHALL,
 October 27.

CROOK v. WRIGHT and Another.

The conduct of a cause, by an attorney, in the name of *A. B.* does not make *A. B.* liable in trespass for acts done under a *fi. fa.* in such cause, without some evidence of a retainer.

A retainer to commence a suit, which suit is afterwards abated by plea for non-joinder, is sufficient evidence of a retainer to commence another action against the parties named in the plea in abatement.

TRESPASS *quare clausum fregit*, and for seizing goods.

An action had been brought by the defendants against the plaintiff and several other persons, in which the defendants obtained a verdict and judgment; a *fi. fa.* was executed on the goods of the plaintiff, but the writ was afterwards set aside by the Court of King's Bench for irregularity. The trespasses complained of in the present action, were committed in the execution of that writ.

The plaintiff proved that one *Jenkyns* was the attorney for the defendants in the former action; that he had issued the writ of *feri facias*, and delivered it to the sheriff's officer. It was contended, on the part of the plaintiff, that the defendants were made liable by the acts of *Jenkyns*, without proving that he had been retained by them to bring the action.

ABBOTT Ld. C. J. was of opinion that some evidence must be given of a retainer in order to make the defendants trespassers.

The plaintiff then called the clerk of *Jenkyns*, who, on being examined, produced a letter from

one of the defendants, desiring *Jenkyns* to commence an action against the plaintiff and two other persons. It was further proved that the plaintiff had pleaded, in abatement of this action, that other parties who were liable were not joined, and that thereupon such action was discontinued. *Jenkyns*, without further authority from the defendants, commenced against the plaintiff, and all who were jointly liable with him, the action in which the *fi. fa.* was sued out, and the alleged trespass committed.

1825.
CROOK
v.
WRIGHT.

ABBOTT Ld. C. J. was of opinion that the authority to commence the first action against the plaintiff, and the two other defendants, was also an authority when that action was discontinued, to commence the second action against the plaintiff, and all those whose non-joinder had been pleaded in abatement, and that the defendants were made trespassers by the acts of their attorney.

Verdict for the plaintiff, damages one shilling. (a)

Scarlett and *R. V. Richards* for the plaintiff.
Gurney and for the defendants.

(a) See *Barker v. Braham*, 3 Wils. 368.

1825.

ADJOURNED SITTINGS AT WESTMINSTER.

WESTMINSTER,
November 5.

DREW and Others v. CLIFFORD.

In an action on an attorney's bill: Held, although the plaintiff could not recover a particular item, because "the fees, charges, and disbursements," included in it were not specified pursuant to the statute 2 G. 2. c. 23. that he might nevertheless recover the residue of the bill, as to which the provisions of the statute had been complied with.

THIS was an action upon an attorney's bill.

A copy of the bill, signed by the plaintiffs, had been delivered to the defendant, pursuant to the 2 G. 2. c. 23. It contained, amongst other items of business done for the defendant, the following one:—"An action having been brought, and judgment obtained, after the defendant had applied to be discharged again under the insolvent act, in which you opposed, and succeeded, the costs of the action were taxed, exclusive of the costs of opposition in the insolvent court, at 52*l.* 17*s.* 6*d.*"

It was proved that this sum of 52*l.* 17*s.* 6*d.* was the amount of the prothonotary's allocatur on the *postea*, in an action brought by the defendant against a person of the name of *Austen*; the costs in that action between the present plaintiff and defendant, as attorney and client, had not been taxed.

E. Larves, for the defendant, contended that in respect of this charge of 52*l.* 17*s.* 6*d.* the plaintiffs had not delivered a bill pursuant to the 2 G. 2. c. 23. (a); that according to the statute, "*the fees*,

(a) By 2 G. 2. c. 23. s. 23. (made perpetual by stat. 30 G. 2. c. 19. s. 75.) for the better regulation of attornies and solicitors, it is enacted, "that no attorney of the Courts of King's Bench, Common Pleas, or Exchequer, &c., nor any solicitor in Chan-

charges, and disbursements” should have been set out in words at length, and not united in one large item. If the bill, with respect to this charge, was not properly delivered pursuant to the direction of the statute, then, according to the case of *Hill v. Humphreys*, 2 B. & P. 343., the plaintiffs are not entitled to recover the other items in the bill.

1825.
DREW
v.
CLIFFORD.

Richards submitted that, at all events, the plaintiffs were entitled to recover the other items, as to which a bill had clearly been delivered pursuant to the statute.

ABBOTT Ld. C. J. I think the plaintiffs cannot recover this sum of 52*l.* 17*s.* 6*d.*, being of opinion that, as respects that item, the plaintiffs have not complied with the provisions of the statute; but as

cery, &c. shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more, after such attorney or solicitor respectively shall have delivered unto the party to be charged therewith, or left for him, at his dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements, written in a common legible hand, and in the *English* tongue, except law terms and names of writs, and in words at length, except times and sums, which bill shall be subscribed with the proper hand of such attorney or solicitor; and upon application of the party chargeable by such bill, or of any other person in that behalf authorised, unto the Lord Chancellor, or the Master of the Rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts, respectively, in which the business contained in such bill, or the greatest part thereof in amount or value shall have been transacted, they may refer the bill, &c. to be taxed, (although no action be depending in such court touching the same).”

1825.

ADJOURNED SITTING

WESTMINSTER,
November 5.

DREW and

jury to find
that they are
the bill, and
shall think fit, to
direct my judgment.
plaintiffs, for 88l. 17s. 4d.

the plaintiffs.

the defendant.

In an action
on an at-
torney's bill:
Held, although
the plaintiff
could not re-
cover a par-
ticular item,
because "the
fees, charges,
and disburse-
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application was made to the Court in the
of 1 to application was made to the Court in the
or preceding term to disturb this verdict.

HOLT v. SQUIRE.

THIS was an action on a bill of exchange by the
indorsee against the acceptor.

A notice, signed by the defendant's attorney,
had been served on the plaintiff, requiring him to
produce and show forth upon the trial of this
cause all papers, letters, memorandums, &c. which
had been received by him from one J. S. relating
to a certain bill of exchange, draft, or order drawn
by the said J. S. (describing the bill), "and which
said bill of exchange, draft, or order was accepted
by the said defendant, payable at Messrs. Butler's,
4. Cheapside, London."

The description of the bill of exchange, in this
notice, agreed in every respect with the bill set
forth in the declaration.

In an action
against the
acceptor of a
bill of ex-
change, where
defendant's
attorney had
given notice
to the plaintiff
to produce all
papers relating
to a bill de-
scribed, as the
bill in question,
and said to be
"accepted by
the said de-
fendant:"
Held, that
such notice
was *prima*
facie evidence
of the defend-
ant's accept-
ance.

lett put in the notice, and proved the hand-
 of the defendant's attorney, and then pro-
 d the bill, without further proof of the

1825.

HOLT

v.

SQUIRE.

the defendant, objected to this being
 evidence of the acceptance, and con-
 ed that some further proof should be given.

ABBOTT Ld. C. J. The defendant in his notice
 has described the bill now produced, and has stated
 that such bill was accepted by the defendant; and
 this, I conceive, is *prima facie* evidence of his ac-
 ceptance.

Nonsuit.

Scarlett and *R. V. Richards* for the plaintiff.
Gurney and *Reader* for the defendant.

1825.

DRAY
v.
CLIFFORD.

to the rest of the bill, I shall direct the jury to find a verdict for the plaintiffs, conceiving that they are entitled to recover the residue of the bill, and leaving it to the defendant, if he shall think fit, to apply to the Court above to correct my judgment.

Verdict for the plaintiffs, for 33*l.* 17*s.* 4*d.*

R. V. Richards for the plaintiffs.

E. Lawes for the defendant.

No application was made to the Court in the succeeding term to disturb this verdict.

WESTMINSTER,
November 4.

HOLT v. SQUIRE.

In an action against the acceptor of a bill of exchange, where defendant's attorney had given notice to the plaintiff to produce all papers relating to a bill described, as the bill in question, and said to be "accepted by the said defendant." Held, that such notice was *prima facie* evidence of the defendant's acceptance.

THIS was an action on a bill of exchange by the indorsee against the acceptor.

A notice, signed by the defendant's attorney, had been served on the plaintiff, requiring him to produce and show forth upon the trial of this cause all papers, letters, memorandums, &c. which had been received by him from one *J. S.* relating to a certain bill of exchange, draft, or order drawn by the said *J. S.* (describing the bill), "and which said bill of exchange, draft, or order *was accepted by the said defendant*, payable at Messrs. *Butler's*, 4. *Cheapside, London.*"

The description of the bill of exchange, in this notice, agreed in every respect with the bill set forth in the declaration.

Scarlett put in the notice, and proved the handwriting of the defendant's attorney, and then proposed to read the bill, without further proof of the acceptance.

1825.

HOLT
v.
SQUIRE.

Gurney for the defendant, objected to this being sufficient evidence of the acceptance, and contended that some further proof should be given.

ABBOTT Ld. C. J. The defendant in his notice has described the bill now produced, and has stated that such bill was accepted by the defendant; and this, I conceive, is *prima facie* evidence of his acceptance.

Nonsuit.

Scarlett and *R. V. Richards* for the plaintiff.
Gurney and *Reader* for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS IN AND AFTER

TRINITY TERM,

6 GEO. IV. 1825.

SECOND SITTING IN TERM IN LONDON.

GUILDHALL,
June 11.

WATT, Gent. one, &c., v. COLLINS.

"Attending A. and B., the proposed bail of the defendant, and examining them as to their competency to justify."
"Attending the plaintiff in several actions commenced against the defendant, and arranging with him to take cognovits therein,"
s. 23.

ASSUMPSIT for work and labour, and the money counts. .

The plaintiff was an attorney, and had delivered an unsigned bill for 300*l.* to the defendant, for business done of various kinds, and for disbursements. It was contended that the plaintiff not having delivered a bill pursuant to the 2 *G. 2. c. 23. s. 23.* must be nonsuited, the following items being relied on as taxable: "Attending Messrs. *Wilson* and *Doyle*, by your desire, who had agreed to bail

therein," are taxable items in an attorney's bill within the 2 *G. 2. c. 23. s. 23.*

you, but, on questioning, found they could not justify, 6s. 8d."— "Mr. *Vearey*, of *Gray's Inn*, having several actions against you, attending him, and advising him to refrain from proceeding further, and arranging to take cognovits in the different actions, 6s. 8d."— *Winter v. Payne*, 6 T. R. 645., was relied on.

1825.
WATT
v.
COLLINS.

For the plaintiff it was answered, that business must be actually done in court, and that none of the items showed that any proceeding in court had been conducted by the plaintiff; that they were all for such services, as might have been performed by any one not an attorney, without rendering himself liable to the penalties under 25 G. 3. c. 80., and that, therefore, they were not taxable items. *Mowbray v. Fleming*, 11 East, 285, was cited.

BEST C. J. I think there are in this bill such taxable items as must prevent the plaintiff's right to recover, unless a bill has been delivered in compliance with the statute. It is necessary to be assured of business having been done in a cause, or that proceedings in court have existed, in the conduct of which the defendant has received assistance from the plaintiff as an attorney; it is enough that this may be fairly collected from the nature of the charge itself. In the case which has been alluded to, of *Winter v. Payne*, it was collected from the item itself, that an affidavit had been actually made. In this case one item shows that the defendant was in immediate want of bail, and that the plaintiff attended the persons proposed, for the purpose of arranging their becoming bail. A cause, therefore, must have existed in which the plaintiff, as an

1825.

WATT

v.

COLLINS.

attorney, furnished his assistance to the defendant. But this is conclusively shown by the items, which expressly state that actions were then commenced against the defendant. If, by the mode of shaping his charges, an attorney could take his demand out of the statute, a most beneficial act would be evaded, and cases taken out of that jurisdiction which is of all others the most proper to decide on them. The inclination of the Court, if any, ought to be to bring an attorney's bill within the range of a statute so useful to the subject. The plaintiff must be called.

The cause was ultimately referred to the prothonotary, and the legal objection withdrawn.

Wilde Serjt. and Platt for the plaintiff.

Vaughan Serjt. and Comyn for the defendant.

See *Fenton v. Correa, supra*, and the cases there cited.

1825.

SITTINGS AFTER TERM AT WESTMINSTER.

DUNNE v. ANDERSON.

WESTMINSTER,
June 23.

CASE for a libel.

The declaration (a) stated, that the plaintiff was a surgeon, and proprietor of a certain profitable establishment called the "*Athénée, or Royal Institute.*" That he had before the committing of the grievances, &c. presented a petition to the House of Commons, praying for certain alterations in the law, in order to suppress empiricism, and to advance real professional merit. That the defendant published, &c. the libel, &c., which was set out, and professed to be a comment upon the petition of the plaintiff.

There were other counts merely setting out the libels complained of.

The publication of the libel was proved by the production of a number of the "*Cottage Physician and Family Adviser,*" of which the defendant was proprietor; and the defendant's refusal to disclose the author of the article complained of was also shown. The number contained several extracts verbatim from the petition, and comments thereon; but it did not appear in what manner the petition had got

It is not libelous fairly to comment on a petition relating to matters of general interest, which has been presented to parliament, and published. The petitioner cannot maintain an action of libel for such comments, unless his private character be vilified; although the publication of the petition be not shown to be his act.

(a) This was a second trial; the pleadings and petition are fully set out in 3 Bing. 88., where the proceedings on the application for a new trial, and the opinion of the Judges, are reported.

1825.
DUNNE
v.
ANDERSON.

before the public, or how it had come to the hands of the defendant, or of the author of the libel. An attempt, on the part of the defendant, to show that the plaintiff had published it, failed.

The plaintiff was proved to be a surgeon by a diploma, the date of which was twenty years back, and no one instance of actual practice was shown.

The nature and object of the plaintiff's establishment, called the "*Athenée*," were not precisely explained; the plaintiff's case being, that it was an institution for useful purposes of a medical and surgical nature; the defendant's, that it was a mere piece of quackery and absurdity.

The defence was, as at the former trial, that the publication charged was a justifiable comment on a matter fairly before the public, and relating to objects of public interest.

BEST C. J., in summing up to the jury, after disposing of the formal parts of the case, observed: It appears that the petition, on which the publication complained of professes to be a comment, has, by some means or other, found its way to the public; how it was published, or by whose means, does not distinctly appear. With respect to literary publications, the law is clearly and ably laid down by Lord *Ellenborough*, in the case (a) of which you have heard; such publications challenge criticism, and any one of the public has a right to make such animadversions on them, as the intrinsic merits of the works may warrant. However severe

(a) *Carr v. Hood*, 1 Campb. 355. n.

those animadversions may be, the author has no right to complain, unless his private character be maliciously vilified. But you are not to infer that a petition presented to either branch of the legislature, and not published, stands on the same footing; the right to petition and to offer suggestions to the legislature is highly valuable, and belongs to every subject of this kingdom; but it behoves a person exercising such right, to take care that he is competent to the task he undertakes, for if he offers a petition on a public measure, and that petition gets before the public, any one of the public has a right to comment on it, and to show that the measures proposed are absurd and impolitic. The mischief would be great and extensive, to hold that a person likely to be affected by those measures, could not be allowed to show them to be inexpedient and injurious. It would be inconsistent with free discussion to say, that comments made with such a view are libellous. But the person making such comments, has no right to attack the private character of the petitioner; he must confine himself to the consideration of the public measures, and not maliciously vilify an individual. If his observations are intended and calculated to inform the public, and not to attack the individual, they are justifiable. After commenting on parts of the paper which alluded to the private character of the plaintiff as a surgeon and individual, His Lordship left it to the jury to say, whether or no, the publication was a fair and proper comment on the petition, or whether its object was to injure the private character of the plaintiff.

Verdict for the plaintiff, damages one farthing.

1825.

DUNNE

v.

ANDERSON.

1825.
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 DUNNE
 v.
 ANDERSON.

Vaughan, Pell, Wilde Serjts. and Platt for the plaintiff.

Spankie Serjt. and Carter for the defendant.

18.

WESTMINSTER,
 June 23.

BEST v. OSBORNE.

A *nerved* horse
 is unsound.

ASSUMPSIT on a warranty of a horse.

The horse had been *nerved*. Several eminent farriers were called, who stated that the operation of *nerving* consisted in the division of a *nerve* leading from the foot, up the leg; that it was usually performed in order to relieve the horse from the pain arising from a disease in the foot; the *nerve* cut, being the vehicle of sensation from the foot. That the disease in the foot would not be affected by the operation, and would go on increasing or not, according to its character. That horses previously lame from the pain of such a disease, would, when *nerved*, frequently go free from lameness, and continue so for years; that the operation had been found successful in cavalry regiments, and horses so operated on had been for years employed in active service. But that in their opinion, a horse that had been *nerved*, whether by accident or design, was unsound and could not be safely trusted for very severe work, and that it was an organic defect. The horse in question had not exhibited any lameness.

BEST C.J. told the jury that it was difficult to say, that a horse in which there was an organic

defect, could be considered sound; that sound meant perfect, and a horse deprived of an useful nerve was imperfect, and had not that capacity of service which is stipulated for in a warranty.

Verdict for the plaintiff.

Wilde Serjt. and *Morris* for the plaintiff.

Vaughan Serjt. and *Platt* for the defendant.

1825.
BEST
v.
OSBORNE.

SITTINGS AFTER TERM IN LONDON.

COUSINS and Another, Gentlemen, two, &c. v.
BROWN and Another, Sheriffs of London.

GUILDHALL,
June 24.

CASE for an escape, and for not assigning the bail-bond.

The declaration stated, that the plaintiffs sued out a certain writ of our said lord the king, called an attachment of privilege, "by which said writ our said lord the king, commanded the said defendants, as sheriffs of the city of *London*, to attach the said *Samuel Fletcher*, so that they might have him before the justices of our said lord the king, on *Monday* next after eight days of *Saint Hilary*, to answer the said plaintiffs of a plea of trespass on the case, to the damage of the said plaintiffs of thirty pounds, and have there that writ;" it was then averred that the writ was indorsed for bail for thirty pounds, &c.

The writ produced was indorsed for bail for thirty pounds, but did not contain the words "to the damage of the said plaintiffs of thirty pounds."

In case against the sheriff for an escape, the declaration stated that the plaintiffs sued out an attachment of privilege, "by which said writ our lord the king commanded the defendants, &c. to attach A. B. &c. to answer the said plaintiffs of a plea of trespass on the case, to the damage of the said plaintiffs of thirty pounds," &c. The writ produced did not contain the words, "to the damage," &c. Held no variance.

1825.

GOWINS

v.

BROWN.

It was objected by *Wilde* Serjt., that this was a fatal variance; that the declaration professed to describe the writ, and any omission was therefore fatal, however immaterial the words omitted might be; and he cited *Baker v. Newbiggen*, 1 Ry. & M. N. P. C. 93.; *Brown v. Jacobs*, 2 Esp. N. P. C. 727.; and *Stiles v. Rawlins*, 5 Esp. N. P. C. 133.

BEST C. J. I am of opinion that the declaration does not profess to describe the writ, but merely to state the substance and effect of what the sheriffs were commanded by it to do. It is proved that the writ was indorsed for bail for thirty pounds, *Fletcher* was, therefore, called upon to answer the plaintiffs in damages to that amount. In the first two cases cited, the declaration professed to describe the instruments, and in a recent case in this Court, *Stiles v. Rawlins* is shaken, if not overruled. I think the variance immaterial. I do not think I ought to give leave to move to enter a nonsuit.

Verdict for the plaintiffs.

Vaughan Serjt. and *F. Pollock* for the plaintiffs.

Wilde Serjt. for the defendants.

1826.

ADJOURNED SITTINGS IN LONDON.

BEDELL v. RUSSELL.

GUILDHALL,
July 8.

TRESPASS.

The declaration contained several counts, for assaulting, beating, and shooting at the plaintiff, on divers occasions.

Pleas (without the general issue), that plaintiff was a mariner on board a certain ship of which the defendant was commander, that the plaintiff at the said times when, &c. was engaged in mutiny, to suppress which, the defendant committed the trespasses complained of.

Replication *de injuria*, &c. generally to all the pleas and issues thereon.

In an action of assault and battery, and a plea of justification only, and issue thereon, the defendant's counsel has a right to begin, the affirmative of the issue being on him. The onus of proving damages does not give the plaintiff's counsel a right to begin.

The pleadings having been opened, it was insisted by *Wilde* Serjt. for the defendant, that he had a right to begin, inasmuch as the affirmative of the issues lay upon him, namely, to prove the facts alleged in justification. And he cited *Hodges v. Holder*, 3 Camp. 366. ; *Jackson v. Hesketh*, 2 Stark. N.P.C. 518. In the latter case *Bayley* J. says, "The question of damages never arose until the issue had been tried."

Vaughan Serjt. for the plaintiff insisted, that the claim of damages gave the plaintiff a right to begin, the affirmative of their amount being upon

1895.

BEDELL
v.
ROSEBELL.

him. That the cases cited were cases of trespass *quare clausum fregit*, where certain rights only were in question; that in this case the essence of the enquiry was the plaintiff's claim of damages.

BEST C.J. But for the authorities cited, I should certainly have thought that the onus of proving the damages sustained gave the plaintiff a right to begin; but as it is of the utmost consequence that the practice should be uniform, I shall consider myself bound by those cases, until the matter shall be settled in full court.

The defendant's case was accordingly first gone into, and the plaintiff's evidence, which consisted of depositions, given in answer; and the defendant's counsel had the general reply.

Verdict for the plaintiff, damages 50*l.* for an assault on an occasion not justified in proof; and for the defendant on the justifications as to the residue.

Vaughan Serjt. and *E. Lawes* for the plaintiff.

Wilde Serjt. and *F. Pollock* for the defendant.

SUMMER ASSIZES, 6 Geo. IV.

WESTERN CIRCUIT.—SARUM.

Coram LITLEDALE J.

REX v. SMITH and JEFFERIES.

THE prisoners were indicted, for stealing two horses, the property of different persons.

It appeared from the statement of the opening counsel, that the horses had been originally stolen in *Somersetshire* by the prisoners when together, but on different days, and at different places.

Erskine for the prisoners submitted, that the felonies being distinct, the prosecutor's counsel should elect on which charge he would proceed.

Langslow for the prosecution stated, that his case would consist entirely of evidence to show that both the horses were found, soon after the robbery, in the joint possession of the prisoners in the county of *Wilts*; and he contended upon the principle, that the possession of stolen goods by the thief, is a new taking in every county through which he carries them, that this evidence would establish the case of a single felony in the county of *Wilts*.

Two prisoners indicted for horse-stealing in county *A*, were found in joint possession of two horses in that county, which they had jointly taken at different times and places in county *B*. Held, that evidence could be given of one only of the takings in county *B*, each taking being a separate felony, and that the prosecutor's counsel must elect on which to proceed.

1825.

REX

v.
SMITH.

LITTLEDALE J. If you could confine your evidence entirely to a single felony in this county, you need not elect; but this you cannot do; for you must prove that the horses were originally stolen in another county. The possession of stolen property soon after a robbery is not in itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking with all its circumstances. I think, therefore, that you must in this instance make your election.

The prisoners were convicted.

DEVON.

Coram GASELEE J.

EXETER,
July 27.

REX v. SARAH HURRELL.

In an indictment on 3 & 4 W. & M. c. 9. s. 5. against a married woman, it is sufficient, where the husband does not cohabit with her, to state that the lodging was let to the wife; for the statement may be either according to the fact, or the legal operation.

THE prisoner was indicted on the statute 3 & 4 W. & M. c. 9. s. 5. for stealing goods in a lodging-house. The indictment stated that the prisoner, late of, &c., the wife of *John Hurrell*, certain goods being in a lodging-room *let by contract to the said prisoner* to be used by her with the said lodging-room, did steal, &c., against the statute, &c.

It appeared in evidence, that the prisoner was a married woman, but that the husband did not co-

habit with her in the lodging-house; nor did he in any manner assent to the contract.

1825.
}
REX
v.
HURBELL.

GASELEE J. at first doubted, whether the letting ought not to have been stated to be to the husband, according to its legal operation; but upon referring to *Healey's* case, 1 Ry. & M. C. C. R. 1., was of opinion that it might be stated, either according to the fact, or the legal operation, and, therefore, held the indictment good.

The prisoner was convicted.

DEVON.

Coram LITLEDALE J.

DOE *d.* NORTHEY *v.* HARVEY.

EXETER,
July 29.

EJECTMENT.

The lessor of the plaintiff claimed as heir at law *ex parte maternâ* of *Mary Rowe*, who died seised of the premises, and intestate.

To prove a pedigree, the declarations of the husband of one of the family are admissible, though he was not otherwise related to the family.

The defence was, that persons of the paternal line of *Mary Rowe* were still living, and in order to prove the pedigree set up by the defendant, the declarations of *John Rowe*, the late husband of *Mary Rowe*, but not otherwise related to her fa-

1825:
Doe d.
NORTHEY
vs.
HARVEY.

mily, were offered; and the case of *Fowles v. Young*, 13 Ves. 140. was relied on,

It was objected, that these declarations were inadmissible, not being made by one of the family, and being at best but information collected from the hearsay declarations of persons of the family.

LITLEDALE J. I think upon principle they are admissible; the husband must for this purpose be considered as one of the family.

Pell, Wilde, Serjts. and *Merewether* for the plaintiff.

Selwyn, R. Bayly and *Carter* for the defendant.

BRIDGWATER.

Coram GABLER J.

REX v. HAYNES.

BRIDGWATER,
August 12.

A Judge at Nisi Prius has no jurisdiction to try an indictment for perjury at common law found at the quarter sessions, and removed by *certiorari* into the King's Bench; an indictment so found being void.

THIS was an indictment for perjury at common law, found at the quarter sessions, and removed by *certiorari* into the Court of King's Bench, and sent down for trial at Nisi Prius.

Upon the case being called on,

and removed by *certiorari* into the King's Bench; an indictment so found being void.

GASHLEE J. said that it was quite clear, that the sessions had no jurisdiction over perjury at common law, and as the indictment was therefore void, he refused to try it.

1825.
 Rex
 v.
 HAYNES.

Jeremy for the prosecution.

Wilde Serjt. for the defendant.

Coram LITLEDAL J.

REX v. ROWLEY.

BRIDGWATER,
 August 13.

THIS was an indictment for perjury, alleged to have been committed by the prisoner as a witness for the defendant, on the trial of an action of assault and battery, at the Summer assizes for Somersetshire, 1824.

The evidence, on which perjury was assigned, was proved, as set out, by the clerk of the attorney for the plaintiff in the action. The witness stated that he took no note of the evidence, but from his duty as the attorney's clerk, he paid particular attention to the evidence given by the prisoner; that he would not undertake to say that he had given the whole of the prisoner's testimony, but that he would swear that nothing else was said which qualified what he had stated, and that to the best of his recollection he had given all that was material to this enquiry and relating to the transaction in question.

In an indictment for perjury committed on the trial of a cause, it is sufficient for the prosecutor to prove all the evidence given by the defendant, referable to the fact on which perjury is assigned. Proof of the evidence set out, by a witness who speaks from memory, but will not swear that he has given the whole of the defendant's former testimony, but

says that he has stated to the best of his recollection all that was material to the present enquiry and relating to the transaction in question, and is positive nothing was said qualifying the evidence proved, is sufficient to go to the jury.

1825.

Rex

Rowley.

For the prisoner it was contended, that the whole of the evidence given by the prisoner on the former trial ought to be proved; that the jury should be enabled to judge, whether any thing qualifying or explaining that set out had been stated by the prisoner; and that for this purpose the opinion of the witness, as to the immateriality of what was omitted, was inadmissible. The authorities relied on were, 2 Chitty Crim. Law, 312. 2 Edit., *Rex v. Jones*, Peake's, N. P. C. 38., *Rex v. Dowling*, ib. 170. And a case tried before Lord GIFFORD, as Recorder of *Bristol*, was stated *ex relatione Jardine*, in which his Lordship had ruled to the same effect.

For the prosecution it was answered, that the general rule in criminal cases, of proving a sufficient case to call for an answer, had been satisfied; that *prima facie* evidence of the whole evidence given by the prisoner, at the former trial, had been offered, and that it lay upon him to prove any omission that qualified what had been proved against him; that it was impossible in any case to prove the evidence given, without in some measure relying on the opinion of the witness reporting it; and that in this case the opinion given was that of a person well qualified to form it.

LITLEDALE J. The allegation in this indictment is, that the prisoner swore to the substance and effect alleged therein; in ordinary cases of plea or indictment, the evidence given would be unquestionably sufficient to support such an aver-

ment; but it is said, upon the authority of the cases cited, that a different principle prevails in indictments for perjury, and that it is necessary to prove the whole of the testimony given by the person charged. I think that proposition too large: suppose that there had been several issues on the former trial, and that the prisoner had given evidence on all of them, but that perjury was assigned on one only, can it be contended that it would be necessary to prove all the testimony given on the other issues? I take the true rule to be this, that all the evidence referable to the fact on which perjury is assigned must be proved; and I am of opinion that there is reasonable evidence to go to the jury, that what the witness has stated, was all the evidence given by the prisoner referable to the perjury here assigned. The objection, that the opinion of the witness is inadmissible as to the materiality of what he might have omitted, does not appear to me to be well founded. He is competent to form such an opinion; his attention was particularly directed to what was passing on the former occasion, and he gives that opinion at his peril, as he is liable to an indictment for perjury for the wilful falsehood of it. I think the prisoner must be called upon to show that something was said by him which qualifies the evidence already proved.

1825.
 Rex
 v.
 ROWLEY.

No evidence was given for the defence, and the prisoner was convicted and sentenced. (a)

(a) His Lordship's decision has been since confirmed by the opinion of the twelve judges.

1825.

Rex

v.

Rowley.

Proof that the defendant was "sworn and examined as a witness," supports an averment that the defendant was sworn on the Holy Gospel, that being the ordinary mode of swearing.

The allegation in the indictment was, that the prisoner "was duly sworn, and took his corporal oath on the Holy Gospel of God."

The proof was, that the witness saw the prisoner sworn and examined.

It was objected, that the particular mode of swearing must be proved, as the evidence given would apply to the oath of a Jew, or person of any other religion than the Christian.

LITLEDALE J. I think it sufficient, the ordinary mode of swearing is the one specified. (a)

C. F. Williams and *Moody* for the prosecution.
Erskine and *W. D. Bayley* for the prisoner.

(a) *Rex v. M'Carthy*, Peake's N. P. C. 155.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

MICHAELMAS TERM,

6 GEO. IV. 1825.

SITTINGS AFTER TERM AT WESTMINSTER.

PEARSON v. WHEELER.

WESTMINSTER,
Nov. 29.

THIS was an action on the case to recover damages sustained by the plaintiff, in consequence of his having been induced to buy a public-house of the defendant, for 1600*l.*, by means of fraudulent misrepresentations by the defendant, of the amount of the business done in the house.

Brougham for the defendant, offered the evidence of surveyors and others, to prove that the public-house was really worth as much as the plaintiff had given for it.

In case against the vendor of a public-house, for fraudulent misrepresentations of the business of the house; evidence of the actual value of the premises, is admissible in reduction of damages, but not as a bar to the action.

1825.
PEARSON
v.
WHEELER.

Scarlett for the plaintiff, objected to the admission of this evidence, on the ground that, in this action, the value of the premises was irrelevant. The purchaser here relies upon the defendant's representation of facts, which the former considers to affect the value of the property, and if this representation is proved to be false and fraudulent, he is entitled to recover, without reference to what may have been the actual value.

ABBOTT Ld. C. J. I am clearly of opinion, that evidence of the value of the public-house will not go to bar the action, but I think it admissible in reduction of damages: the measure of damages, in this case, being the difference between the real value of the property, and the sum which the plaintiff was induced to give for it.

Verdict for the plaintiff for 250*l.* (a)

Scarlett and *Jardine* for the plaintiff.

Brougham and *R. V. Richards* for the defendant.

The same point was decided by BEST C. J. in *Compton v. Henshaw*, tried at the *London* sittings after *Michaelmas* term, 1825.

(a) *Dobell v. Stevens*, 3 B. & C. 623.

AFTER MICHAELMAS TERM, 6 GEORGE IV.

CORNWALL v. RICHARDSON.

THE first six counts of the declaration, were for slandering the plaintiff, in imputing to him that he had stolen money from the defendant. The seventh count was, for maliciously charging the plaintiff with felony before a justice of the peace, and causing him to be arrested and imprisoned until he was discharged by the justice. The eighth count was, for openly imposing the crime of felony on the plaintiff, and for injuring him in his credit, &c. The defendant pleaded the general issue to the whole declaration, and to the first six counts several pleas of justification, alleging therein that the plaintiff had stolen money from him, the defendant.

Scarlett, who was for the plaintiff, previous to closing his case, proposed to call witnesses, to give evidence of the general good character of the plaintiff for honesty.

ABBOTT Ld. C. J. interposed, and stated, that he was not aware that in any case like the present, the plaintiff had been allowed to go into evidence of his general character for honesty. That if such evidence was to be admitted on the part of the plaintiff, then the defendant must be allowed to go into evidence, to prove that the plaintiff was a man of bad character. It made no difference what-

1825.
 CORNWALL
 v.
 RICHARDSON.

ever as to the admissibility of such evidence, that there was a special justification.

Verdict for the plaintiff.

Scarlett and *Wightman* for the plaintiff.

Denman C. S. and *Thesiger* for the defendant.

See *Rodriguez v. Tedmire*, 2 Esp. N. P. C. 721. *Rex v. Waring*, 5 Esp. N. P. C. 13. *Bamfield v. Massey*, 1 Campb. 460. *Dodd v. Norris*, 3 Campb. 519. *Newsam v. Carr*, 2 Stark. N. P. C. 69. Stark. Evid. pt. iv. pp. 367. 917.

Warrington,
 Dec. 5.

CHADWICK v. BUNNING.

The statute 6 G. 4. c. 133. s. 7. enacting that the common seal of the society of apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate, to which such seal is affixed, does not make such certificate evidence, without proof that the seal affixed is the genuine seal of the society.

THIS was an action, by an apothecary, to recover the amount of a bill, for medicines furnished to the defendant.

In order to prove that the plaintiff was qualified to practise as an apothecary, a certificate granted to him by the apothecary's company was produced, with the common seal of the company affixed to it.

Scarlett for the defendant, objected to its being received in evidence, until it was proved that this was the common seal of the company.

Russell for the plaintiff, contended that such evidence was unnecessary; that in consequence of

the difficulty of authenticating the certificate of qualification, the legislature had expressly provided by the 6 G. 4. c. 133. s. 7., that "the common seal of the said society, of the art and mystery of apothecaries, of the city of *London*, shall be deemed to be, and shall be received in every court of law or equity, in any part of *England* or *Wales*, as sufficient proof of the authenticity of the certificate, to which such seal shall be affixed, and that the person therein named is duly qualified to practise as an apothecary in any part of *England* or *Wales*." If the construction contended for by the defendant's counsel, was to be put upon this act, it's provisions would in effect be a nullity. The difficulties as to proof, mentioned in the reciting part of this section, would be the same as before the statute passed.

1825.
CHADWICK
v.
BUNNING.

ABBOTT Ld. C. J. I am of opinion that the act of parliament does not make the seal prove itself, but that you must show by other evidence that it is the common seal of this society.

The seal was afterwards proved to be the common seal of the apothecaries' company. The certificate was dated the 14th of *October* 1819. It certified generally that the plaintiff was qualified to practise as an apothecary, without any limitation as to time or place. On the back of the certificate was the following indorsement:—"I do hereby certify, that the within named *B. C.* hath paid the sum of 4*l.* 4*s.* to enable him to practise in the city of *London*, pursuant to the act of parliament within mentioned, (the 55 G. 3.) for the

A general certificate of qualification to practise, without limitation as to time or place, is sufficient under the 55 G. 3. c. 194. to enable an apothecary to sue on a bill for medicines, &c. furnished to patients in *London*, though on the

1825.

CHADWICK
v.

BUNNING.
back of such
certificate is
endorsed a
receipt for
four guineas
proved to
have been
paid after the
commence-
ment of the
action; which
sum the 19th
section directs
to be paid,
and the receipt
endorsed,
where persons
originally
qualified by
their cer-
tificate, to
practise in the
country,
obtain the
privilege of
practising in
London.

Masters and Wardens of the society of apothecaries. (Signed) *E. B.*" There was no date to this indorsement; but it was proved, that the 4*l.* 4*s.* was paid by the plaintiff to the apothecaries' company in *June* 1825, subsequent to the commencement of the present action. The plaintiff attended the defendant as an apothecary in *London*, and furnished the medicines in 1822 and 1823.

Scarlett for the defendant, contended that the plaintiff could not recover, not having at the time this action was commenced, obtained a certificate to practise in *London*, according to the provisions of the 19th section of the 55 G. 3. c. 194. (a), and

(a) By which it is enacted, " that the sum of ten pounds ten shillings shall be paid to the said master, wardens, and society of apothecaries, for every such certificate as aforesaid, on obtaining the same, by every person intending to practise as an apothecary within the city of *London*, the liberties or suburbs thereof, or within ten miles of the same city; and the sum of six pounds six shillings by every person intending to practise as an apothecary in every other part of *England* or *Wales* (except the said city of *London*, the liberties or suburbs thereof, or within ten miles of the said city); and no person having obtained a certificate to practise as an apothecary in any other part of *England* or *Wales* (except the said city of *London*, the liberties or suburbs thereof, or within ten miles of the said city as aforesaid), shall be entitled to practise within the said city of *London*, the liberties or suburbs thereof, or within ten miles of the said city, unless and until he shall have paid to the said master, wardens, and society, the further sum of four pounds four shillings, in addition to the said sum of six pounds six shillings so paid by him as aforesaid, and shall have indorsed on his said certificate, a receipt from the said master, wardens, and society, for such additional sum of four pounds four shillings; and the sum of two pounds two shillings by every assistant; and the several sums of money arising from

that, consequently, he was within the provisions of the 21st section. (a)

1825.
CHADWICK
v.
BUNNING.

ABBOTT Ld. C. J. There is no clause in the statute pointing out the form in which the certificate is to be granted. The certificate given in evidence is general, without any distinction as to the place where the party to whom it is granted is to practise. The apothecaries' company having certified generally, that the plaintiff is qualified to practise, I cannot, either by looking at the provisions of the 19th section of the 55 G. 3. c. 194., or from the evidence that has been given of the payment of the 4*l.* 4*s.*, together with the indorsement on the back of the certificate (which is without any date) of the receipt of that sum, say, that at the time this certificate was granted to the plaintiff, he was only qualified to practise in the country.

Verdict for the plaintiff.

W. Oldnall Russell, and *Ryan* for the plaintiff.
Scarlett for the defendant.

the granting of such certificates shall be applied in manner hereinafter directed."

(a) By which it is enacted, "that no apothecary shall be allowed to recover any charges claimed by him, in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the said fifth day of *August* one thousand eight hundred and fifteen, or that he has obtained a certificate to practise as an apothecary, from the said master, wardens, and society of apothecaries as aforesaid."

1825.

WESTMINSTER,
Dec. 5.STUART v. WHITTAKER and Another, late
Sheriff of *Middlesex*.

Action against the sheriff for a false return to a writ of *fi. fa.* The sheriff had returned *nulla bona*, after satisfying the landlord's claim for rent, and king's taxes: Held, that after the plaintiff had assented to the sheriff's quitting possession of the premises upon the claim of rent and taxes appearing to exceed the value of the goods seized, he could not maintain an action for a false return, although the claim for rent was altogether unfounded.

THIS was an action against the sheriff, for a false return to a writ of *fi. fa.* issued against one *James Phillips*, at the suit of the plaintiff.

On the 29th of *May* 1824, the goods of *Phillips* were seized at his dwelling-house, under this writ. The officer in possession, on the same day wrote to the plaintiff's attorney, informing him that he had levied, but added at the bottom of the note, "Since I wrote the above, I have had a claim of 36*l.* for rent, and 9*l.* 17*s.* 6*d.* for king's taxes." The value of the goods seized was less than the amount of the claim for rent and taxes. The plaintiff's attorney did not receive this note until the morning of the 31st of *May*.

On the 31st of *May* the sheriff's officer quitted possession of the premises, and on the evening of the same day he called at the office of the plaintiff's attorney, and informed him that he had quitted, because the claim for rent and king's taxes exceeded the utmost price the goods would fetch. The officer requested the plaintiff's attorney to pay him for the three days' possession, which the attorney accordingly did. *Phillips* on the 19th of *June* was arrested on a *ca. sa.*, at the suit of the plaintiff, for the same debt for which the levy was made under the *fi. fa.*, and on the 14th of *August* he was discharged under the insolvent debtor's act. After *Phillips* was discharged, the

plaintiff's attorney was informed of facts, which made it doubtful whether the parties who had given notice to the sheriff to retain the rent, were in law entitled to, the same; upon which the sheriff was ruled to return the writ. The sheriff returned *nulla bona*, after satisfying the claim for rent and taxes, upon which, this action was commenced for a false return.

1825.
STUART
v.
WHITTAKER.

ABBOTT Ld. C.J. I am of opinion, upon the evidence which has been given, (without entering into the question whether the parties who had given notice to the sheriff were entitled to the rent,) that the conduct of the plaintiff has been such as to justify the sheriff in making this return. It appears to me that the plaintiff has by his conduct, so assented, to the claim of the landlord, as to discharge the sheriff from all responsibility, and that he cannot, after sanctioning the officer in giving up possession of the premises, by paying him, in the manner that has been proved, and by adopting another remedy, namely, in suing out a *ca. sa.*, and taking Mr. *Phillips* in execution, recover against the sheriff for a false return, however unfounded the claim for rent might turn out to have been.

Nonsuit.

Scarlett and *Patteson* for the plaintiff.
Gurney and *Holt* for the defendants.

1825.

WESTMINSTER,
Dec. 6.EASTWOOD v. BROWN and Another, Sheriff
of *Middlesex*.

A sale to a creditor of personal property, by a person in embarrassed circumstances, without any change of possession, is valid, unless made with a fraudulent intention to defeat other creditors. The continuance of possession is not conclusive evidence of fraud.

THIS was an action of trover against the sheriff of *Middlesex* for goods belonging to the plaintiff, taken under a writ of *feri facias* against one *Pope*.

It appeared in evidence, that *Pope*, previous to the issuing of the execution, had sold and assigned his interest in a leasehold house, in which he resided, and also the whole of his furniture and household effects to the plaintiff, who was a creditor. Out of this purchase money *Pope* paid the debts of several of his other creditors. There was no direct evidence of fraud in the transaction; and it did not appear that the plaintiff gave less than the full value for the property so assigned to him, but *Pope* continued in the occupation of the house and furniture after the assignment, precisely in the same manner as before.

Scarlett, in addressing the jury for the defendants, contended, upon the authority of Lord *Ellenborough* in the case of *Wordall v. Smith*, 1 Campb. 333., that an assignment of property without a complete and entire change of possession, is fraudulent and void as against creditors.

ABBOTT Ld. C.J. I shall leave it to the jury to say, whether, under all the circumstances of this case, they are satisfied that the assignment was

made with the design of delaying or defeating creditors in the recovery of their debts. I cannot agree to the doctrine laid down in the case cited by Mr. *Scarlett*. The circumstance of an assignor who is under pecuniary embarrassments, remaining in possession of the property assigned, is always suspicious; but if it does not appear, from other facts in the case, that this takes place under a fraudulent arrangement between the parties, for the purpose of delaying creditors, I am of opinion that it is not of itself a *conclusive* badge of fraud. I have no doubt that a purchase of a house and furniture, with an immediate demise of that house and furniture to the vendor, may be good, if there be no intention to defeat or delay creditors by the transaction, and it is material that in this case it does not appear that any actions by other creditors had been brought.

1825.
EASTWOOD
P.
BROWN.

Verdict for the plaintiff. (a)

Gurney and *Comyn* for the plaintiff.

Scarlett and *F. Pollock* for the defendant.

(a) In *Edwards v. Harben*, 2 T. R. 697. *Buller* J. in giving judgment says, "This has been argued by the defendant's counsel, as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se*, as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent." In *Kidd v. Rawlinson*, 2 B. & P. 59. Lord *Eldon* confines this principle to cases "where the parties stand in the relation of debtor and creditor, and where their object was to defeat other creditors;" and at the trial of that cause his Lordship so left the question

1825.

EASTWOOD
v.
BROWN.

to the jury. In *Hoffman v. Pitt*, 5 Esp. N. P. C. 25. Lord *Ellenborough* says, "the not taking possession is not conclusive evidence of fraud to make the deed absolutely void, there must be something to shew the deed fraudulent in the concoction." The case relied on by *Scarlett* was an assignment to a creditor. See also Prec. in Chan. 287. and the cases collected in note to 1 Campb. 334. *Latimer v. Batson*, 4 B. & C. 652.

WESTMINSTER,
Dec. 7.

TOWNSHEND v. CARPENTER, Gent.

One, &c.

A sheriff's officer employed by an attorney to make arrests on *meane* process, issued at the suit of his clients, may sue the attorney for the fees usually allowed for such arrests, on the taxation of costs by the Master, though such fees exceed the sum allowed to the sheriff and bailiff by the 23 H. 6. c. 10.

ASSUMPSIT.

The first count of the declaration stated, that the defendant was indebted to the plaintiff in the sum of 30*l.*, &c. for fees and rewards before that time due and payable from the said defendant to the said plaintiff, as a sheriff's officer, for work, &c. as such sheriff's officer, in and about the making of divers captions, and executing and serving certain writs and processes for the said defendant, &c.

The plaintiff, it appeared, was one of the officers to the sheriff of *Surrey*, and had been employed by the defendant, who was an attorney, to make arrests on writs issued to the sheriff of *Surrey*, at the suit of persons who were clients of the defendant. It was proved, that the fees claimed by sheriff's officers in the county of *Surrey*, upon any caption within the turnpike-gate adjoining the Obelisk were half a guinea, but where the caption was beyond the gate, the fees were one guinea. These fees, it was proved, were usually paid by

the attorney of the plaintiff at whose suit the writ issued, and were allowed in the taxation of costs by the Master. The fees claimed in this action were for arrests on *mesne* process.

1825.
TOWNSEND
v.
CARPENTER.

ABBOTT Ld. C.J. I do not recollect any case where it has been held, that such an action as the present may be maintained by a bailiff against the attorney of the plaintiff at whose suit a writ has issued, especially as by the 23 of *Hen. 6. c. 10.* the sheriff is only entitled to twenty-pence, and the bailiff to four-pence on every arrest on *mesne* process. I am, however, of opinion, upon the evidence that has been given, of the custom by attorneys to pay the bailiffs, and of the fees claimed in the present case being those usually paid to bailiffs of the sheriff of *Surrey*, and allowed by the Master in the taxation of costs, that the plaintiff may recover.

Verdict for the plaintiff for 2*l.* 12*s.* 6*d.* (a)

Chitty for the plaintiff.

The cause was undefended.

(a) This ruling of the Lord Chief Justice has been confirmed by a subsequent case, *Foster v. Blakelock*, Easter Term 1826, (*ex relatione Cresswell*). This was an action of assumpsit for work and labour and fees as a sheriff's officer, against the defendant, as executor of an attorney. It was tried before Mr. Serjeant *Cross*, at the York Spring Assizes 1826. A bill was given in evidence, which contained charges for arrests on *mesne* process exceeding the fees allowed on such arrests by the statute of 23 of *Hen. 6. c. 10.*, but not exceeding what the Master allows on the taxation of costs. The bill also contained charges for carrying prisoners to gaol: when

1825.

TOWNSHEND
v.
CARPENTER.

this bill was delivered to testator, he did not object to the items, but desired it might rest awhile.

The plaintiff, under the direction of the learned Serjeant, recovered the amount of this bill, and *Wightman* in this term moved for a rule to shew cause why the verdict should not be set aside. He contended, that a sheriff's officer could not maintain an action for his fees; that this was an action of the first impression. In *Drew v. Parsons*, 2 B. & A. 562. it was decided that a sheriff could only recover the fees allowed by the statute 21 Hen. 6. c. 10. He also contended, that this action, if it could be maintained at all, should have been brought against the principals, whose names were mentioned in the account rendered.

ABBOTT Ld. C. J. The Court are of opinion that the rule should not be granted. We are all of opinion that the sheriff could not in an action against the party arrested recover more than the fees allowed upon such arrest by the statute; but the prohibition only extends to the party arrested. The question here is, whether the officer was not *specialty* employed by the testator to make the arrests. The plaintiff having been specially employed, may it not be presumed that the party specially employing him gives him to understand that he will pay him such sum as the Master in the taxation of costs is in the habit of allowing? I think it may be presumed that such was the understanding, and if so, the plaintiff is entitled to claim the sum of the attorney, not of the principal, of whom he knows nothing.

1825.

ADJOURNED SITTINGS AFTER TERM IN LONDON.

MONTRIOU v. JEFFERYS.

GUILDHALL,
Dec. 8.

THIS was an action upon an attorney's bill.

The defence set up was, that the costs had been incurred through the negligence of the plaintiff and his agents.

It is a good defence to an action on an attorney's bill, that the costs sought to be recovered were incurred through inadvertence and want of proper caution on the part of the attorney.

The facts given in evidence were as follows:—

On *Saturday*, the 3d of *November* 1821, the plaintiff being at *Glensford*, in the county of *Suffolk*, was requested by the defendant, and several other farmers resident there, to attend on their behalf, at a petty sessions to be holden on the following *Monday*, where the defendant and the other farmers were summoned to answer a claim made under the 7 & 8 *W. 3. c. 6.* for small tithes. Upon this application being made to the plaintiff, he informed the defendant that he was returning to town the next day, but that a *Mr. King* (an attorney, and agent to the plaintiff residing in the neighbourhood) would attend the petty sessions for him, and act according to his directions.

On the *Saturday* evening, the plaintiff and *King* examined together the statute of 7 & 8 *W. 3., c. 6.*, by the eighth section of which it is provided, "that where any person or persons complained of for substracting or withholding any small tithes or other duties aforesaid, shall before the justices of the peace to whom such complaint is made, insist

1825.

MONTAGU

v.

JEFFERYS.

upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he or she is or ought to be freed from payment of the said tithes, or other dues in question, and deliver the same in writing to the said justices of the peace, subscribed by him or her, and shall then give to the party complaining, reasonable and sufficient security, to the satisfaction of the said justices, to pay all such costs and damages, as upon a trial at law to be had for that purpose in any of his majesty's courts having cognizance of that matter, shall be given against him, her, or them, in case the said prescription, composition, or *modus decimandi*, shall not upon the said trial be allowed; that in that case the said justices of the peace shall forbear to give any judgment in the matter; and that then and in such case, the person or persons so complaining, shall and may be at liberty to prosecute such person or persons for their said substruction in any other court or courts whatsoever, where he, she, or they might have sued before the making of this act; any thing in this act to the contrary notwithstanding."

On the *Monday* Mr. King attended for the plaintiff before the justices, and informed them that the parties were not prepared to go into their evidence in support of a *modus*, which, he stated, was their answer to the claim of tithes, and requested, that as he had no evidence, and had desired the parties to return home, the justices would adjourn the hearing to some future day. The justices refused this application, and made an order under the 7 & 8 *W.3. c.6.* upon the defendant for the tithes. Against this order, the defendant,

under the advice and direction of the plaintiff, appealed to the quarter sessions. The plaintiff attended the sessions, prepared with witnesses to support the modus, but when the appeal was called on, the justices thought, that as no evidence had been given before the petty sessions, in support of a modus, the appeal ought not to be entertained by them, and therefore confirmed the order. The plaintiff applied for a case for the opinion of the Court of King's Bench, which was accordingly granted, and that Court decided that the quarter sessions were right, in not entering into the appeal. (See this case, *Rex v. Jeffreys*, 1 B. & C. 604.)

1825.
MONTRIGU
v.
JEFFREYS.

For the costs of these proceedings the present action was brought.

Marryatt and *Manning* for the defendant, contended, that upon this evidence the defendant was entitled to a verdict, that the whole miscarriage of the cause, had arisen, through the plaintiff's neglect. That where a modus is in question, the magistrates are directed to refrain from interposing if due notice is given, and the securities entered into which the statute of *William* requires. The plaintiff was informed of this provision in the statute, and yet incurred all this fruitless expence. These costs have been incurred through his own negligence and misconduct, and he cannot in a court of law recover them.

ABBOTT Ld. C.J. (After stating the evidence at length.) The question on which your verdict should depend, is this, — whether or not these costs have

1825.
 MONTIQU
 v.
 JEFFERYS.

been incurred through inadvertence, and want of proper caution on the part of the plaintiff? If you are of opinion that the expences which the plaintiff now seeks to recover, were occasioned by the want of proper caution, then I think your verdict should be for the defendant. For a mere error no man is accountable; no attorney, or counsel, is bound to know the law in all cases; nor is an attorney to lose his fair remuneration, because he has committed such an error, as a cautious or prudent man might make; but an attorney is bound to bring to the exercise of his profession reasonable diligence and skill. If you think the plaintiff has brought all this expence upon the defendant from want of proper caution, by omitting to give the notice, and by not advising the securities to be entered into which the statute of *William* requires, then I think your verdict should be for the defendant; on the other hand, if you think the plaintiff committed such an error, as a prudent and cautious man might fall into, then I think you should find for the plaintiff.

Scarlett, after this summing up, consented to be nonsuited. (a)

Scarlett, *Gurney* and *Sterks* for the plaintiff.
Marryatt and *Manning* for the defendant.

(a) *Farnsworth v. Garrard*, 1 Campb. 38. *Templer v. M'Lachlan*, 2 N. R. 196. *Havelock v. Geddes*, 10 East, 555. *Denew v. Daverell*, 3 Campb. 451. *Duncan v. Blundell*, 3 Stark. N. P. C. 6. See 2 Stark. Evid. 133

1825.

POCOCK v. MOORE.

GUILDHALL,
Dec. 2.

TRESPASS for an assault and false imprisonment, with a count for a common assault.

The defendant had sent for a constable, and directed him to take the plaintiff on a charge of felony. The constable said, "You must go with me," on which the plaintiff said, "he was ready to go," and actually went with the constable towards a police-office, without being seized or touched by the constable. On his way he attempted to escape, on which the constable seized him, the defendant not being present.

The first count of the declaration was not proved as laid.

Scarlett for the defendant, objected that in point of law, the defendant had committed no assault by charging the plaintiff with felony in the presence of the constable; that the plaintiff had himself expressed his readiness to go, and actually went without violence towards the police-office, and that the seizure on the way to the police-office was no assault by the defendant unless he were present, and directing it, which was not the case.

ABBOTT Ld. C.J. I am of opinion, that if a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go,

A constable directed by the defendant to take the plaintiff on a charge of felony, told the latter, "You must go with me," upon which the plaintiff without further compulsion attended the constable: Held, that this was a sufficient imprisonment to support an action, and that the plaintiff failing in proving the imprisonment as laid, might recover on the count for a common assault.

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Pocock
v.
Moore.

and does actually go, this is an imprisonment, and gives the party thus consenting to go, an action of false imprisonment. Then, as every imprisonment includes an assault, the plaintiff may recover on the count for a common assault.

Verdict for the plaintiff, damages one farthing.

Brougham and *Abraham* for the plaintiff.
Scarlett and *Nicholls* for the defendant.

Vide *Russen v. Lucas*, supra 27. *Emmett v. Lyne*, 1 N. R. 255. Stark. Evid. pt. iv. p. 1449. Dalt. c. 170. *Arrowsmith v. Le Mesurier*, 2 N. R. 211. 3 Coleridge's Blac. Comm. 288.

GUILDHALL,
Dec. 10.

NIAS v. NICHOLSON.

In an action against an acceptor of a bill of exchange, who pleaded his discharge under the insolvent debtor's act: Held, that the description in the schedule of a bill, as drawn by the defendant and accepted by A. B. (who was in fact the drawer of the bill sued on), and held by C. D. (an indorser on the bill,) for the precise sum and of nearly the same date as the bill sued on, is a sufficient description for the discharge of the defendant; the misdescription of the bill not being intended, nor likely to deceive the holder.

ACTION, by the indorsee of a bill of exchange for 50*l.*, against the acceptor. Pleas, general issue, and a discharge under the insolvent debtor's act.

The bill, on which the action was brought, was drawn by one *Mitchell*, and accepted by the defendant. It was indorsed by one *Daudridge*, among other persons.

For the defence, the proceedings in the insolvent debtor's court in discharge of the defendant were produced. Among the debts in the schedule, was an admitted debt to *Daudridge* of 640*l.*, for which

the proceedings in the insolvent debtor's court in discharge of the defendant were produced. Among the debts in the schedule, was an admitted debt to *Daudridge* of 640*l.*, for which

he was stated to hold divers securities, and, among others, three bills drawn by *Nicholson* and accepted by *Mitchell*, each for 50*l*.; the date of one of these bills corresponded within two or three days with the date of the bill declared on: and it was suggested, that this was intended as a description of the bill declared on.

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 NYAS
 v.
 NICHOLSON.

On the production of this schedule, *Scarlett* objected, that it could not operate as a discharge to the defendant from the bill in question, the plaintiff not being mentioned as a creditor, nor the bill itself inserted. On the authority, however, of *Forman v. Drew*, 4 B. & C. 15.; and *Wood v. Jowett*, ib. 20. n. *Abbott* Ld. C. J. allowed the case to proceed. Evidence was then given, that there were no outstanding bills of like date, or amount, in which *Nicholson* was drawer and *Mitchell* acceptor, and some other circumstances were shewn, tending to prove that the bill mentioned in the schedule was meant for that declared on.

ABBOTT Ld. C. J. The statute requires that the insolvent should deliver a schedule designating all the creditors, against whom he seeks to be discharged, and the nature and amount of their respective claims. I say designating, rather than naming, because in cases of bills of exchange, and other transferable instruments, it may often be impossible for the insolvent actually to *name* the holder.

His Lordship then stated the facts of the case, and after observing that no bill appeared ever to have existed, exactly corresponding with that described in the schedule, and that the plaintiff, had

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Nias
v.
Nicholson.

he examined the schedule, would have seen mention of a bill, corresponding in amount and very nearly in date with that which he held, and also appearing to have been in the hands of *Daudridge*, but inverting the names of the drawer and acceptor, proceeded thus : —

The question for you is, whether you think that the bill declared on, is that intended to be described in the schedule ; and if so, that the misdescription was not intended to deceive or mislead the holder, and not likely to produce that effect. If you think so, you will find for the defendant : if you think that the description in the schedule was not intended for the bill declared on, or being so intended, that the misdescription was likely to deceive the holder, or although not really likely to deceive the holder, was intended to deceive him, you will find for the plaintiff.

Verdict for the defendant.

Scarlett and *Dowling* for the plaintiff.

Chitty for the defendant.

1825.

RAYNER v. LINTHORNE.

GUILDHALL,
Dec. 14.*ASSUMPSIT.*

This action was brought, to recover a compensation in damages, for a breach of contract in not accepting and paying for fifty casks of tallow, which the defendant (as alleged in the declaration) had bought of the plaintiff.

In order to prove the contract as stated in the special counts of the declaration, the following bought note was given in evidence.

" London, 1st March 1825.

" Bought this day for account of Mr. *Benjamin Linthorne, of my principal*, fifty casks new, and first sort, *St. Petersburg* yellow candle tallow, at 44s. per cwt., warranted to be delivered from wharf warehouse, on landing scale in *London* from 21st to 31st of this month, and the amount to be paid by the buyer, in ready money, deducting $2\frac{1}{2}$ per cent. discount, the seller giving fourteen days previous notice of the delivery, customary tare, and draft.

" In case of dispute respecting the quality this contract shall not be cancelled, but the same settled by arbitration.

" J. B. RAYNER,
" Broker."

Marryatt and *Pollock*, for the defendant, contended, that upon this evidence the plaintiff must be nonsuited; no cause of action in this case

Action for not accepting fifty casks of tallow, stated in the declaration to have been bought of the plaintiff. The bought note put in evidence by the plaintiff was, " Bought this day for account of Mr. *Benjamin Linthorne, of my principal*, fifty casks, &c. signed, *J. B. Rayner, broker*." Held, that this action could not be maintained in the name of the plaintiff, there being no note in writing to take the case out of the statute of frauds, the note produced stating the tallow to be sold by the plaintiff as broker, and not as averred in the declaration, by the plaintiff himself.

1825.
 RAYNER
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 LINTHORNE.

arises on the common counts of the declaration, the action, if maintainable at all, must be on the special counts, now all the special counts state the contract to have been made directly with the plaintiff himself; whereas the bought note represents the plaintiff merely in the character of a broker selling for his principal; if, therefore, the plaintiff is to be considered as the principal, then there is not a note in writing within the statute of frauds.

Gurney and Comyn, contended that the plaintiff was entitled to sue upon the contract proved, and that, although in the contract he is named as broker, still as no principal was called for, the right to sue vests in him, and he may consistently state in the declaration, the contract to have been made with him. They cited as a case in point, *Atkins v. Amber*, 2 Esp. N. P. C. 493.

ABBOTT Ld. C. J. If it is contended in this case, that the plaintiff has a right to sue as principal, then I am of opinion, that no evidence has been given of a contract in writing, which the statute of frauds expressly requires, where there has been no delivery of the goods. If the contract produced is to be taken as the one on which the plaintiff sues, he is there described as the broker, and not as the principal, with whom the contract is made. In the case which has been cited by the defendant's counsel, no question arose upon the statute of frauds, for there the goods had been actually delivered. I am clearly of opinion, that the plaintiff cannot recover, and I should be very unwilling to lay down a rule that would encourage a practice

now so frequent amongst brokers, of not disclosing the names of their principal.

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RAYNER

v.

LINTHORNE.

Nonsuit.

Gurney and Comyn for the plaintiff.

Marryatt and F. Pollock for the defendant.

BRYAN v. WAGSTAFF.

GUILDHALL,
Dec. 15.

THIS was an issue, on a writ of error to reverse an outlawry. Assignment of error, that the plaintiff in error, before and at the time of awarding, and issuing the writ of *exigi facias*, was in parts beyond the sea.

Notice to produce a letter relating to the matters in dispute, served on the attorney of the party, on the evening next but one before the trial, held sufficient to let in secondary evidence of the contents, though the party was out of England.

Plea, that the plaintiff in error, "before the awarding and issuing the writ of *exigi facias*, on which the said outlawry was pronounced, of his fraud and covin, and in order to defeat the defendant in error of the means of recovering his just debt against the plaintiff in error, and for the purpose of avoiding the said outlawry, when the same should be pronounced, did voluntarily leave the realm of *England*, and go into parts beyond the sea, and of such his fraud and covin did voluntarily stay and remain in parts beyond the sea, from thence and until after the awarding and issuing the said writ of *exigi facias*, and the pronouncing of outlawry as aforesaid." Replication taking issue.

1822.
BRYAN
v.
WAGSTAFF.

Scarlett for the defendant in error, claimed to address the jury first, on the ground that the affirmative of the issue lay on him, to which *Abbott* Ld. C. J. acceded, after objection by *Campbell*, that he should have to shew circumstances proving a cause, why the plaintiff in error absented himself, different from that alleged by the plea.

Notice had been given to the plaintiff in error to produce a letter described in the notice, as dated on or about *September* 6th, 1822, and addressed to him by the attorney for the defendant in error, making application to him for the payment of a debt due from him to the defendant in error, and informing him that legal proceedings would be resorted to against him if the debt were not forthwith paid. This notice was served on the attorney for the plaintiff in error, on the evening next but one before the trial of the issue, and when the plaintiff in error was not in *England*.

Campbell objected to the admission of secondary evidence of the contents of the letter, and he mentioned a case in which it had been held, that secondary evidence could not be given when the notice was served on the eve of the trial on the attorney, the party being out of the kingdom, and the paper not one likely to be in the custody of the attorney.

ABBOTT Ld. C. J. I must presume a person going abroad and leaving his attorney to conduct a trial in which he is a party, to leave with him all papers necessary to the conduct of the trial; I think that this letter as described in the notice,

appears to be so connected with the subject of the trial, as to render the service on the attorney of the notice to produce sufficient to let in secondary evidence of its contents.

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v.
WAGSTAFF.

It appeared that the plaintiff in error left his residence in the country, and came secretly to London for the purpose of avoiding arrest on a *testatum capias* issued in the action, and on which there was a warrant to take him, on the 28th September 1822. He left England on the 19th of October in the same year. Writs of *capias*, *alias*, and *pluries*, were all issued on the 18th of November, and on the 17th December 1822, a writ of *exigi facias*, grounded on them.

On a writ of error to reverse an outlawry, because the defendant was beyond seas, (if it be any answer that he went there for the purpose of avoiding the outlawry,) it is enough that he went to avoid outlawry in the action; it need not appear that he went in contemplation of the particular proceedings which did actually terminate in the outlawry.

Campbell for the plaintiff in error, argued that the plea, supposing it good in law, against which he cited *Hesse v. Wood*, 4 Taunt. 691. was not supported by evidence, unless the leaving England appeared to have been for the purpose of avoiding the outlawry; and that this could not be in the present case, since the proceedings to outlawry were unconnected with the arrest threatened in September, to avoid which he left his residence, and did not actually commence till the 18th of November, the plaintiff in error having left England on the 19th of October, at which time it did not appear that any such proceedings were ever contemplated.

ABBOTT Ld. C.J. The process in September was upon an original writ, on which, therefore, outlawry might have followed. Had that proceed-

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 }
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ing been by bill or by latitat, I should have thought there was great weight in the argument for the plaintiff in error; but as it was by original, it is open to the jury to consider whether it was not the object of the plaintiff in error to secure himself from the outlawry which might follow upon that process, as well as from the arrest which was immediately contemplated. What the law may be, supposing that to be his intention, is to be considered elsewhere.

His Lordship then commented on the facts of the case, and concluded by leaving the question to the jury, in the words of the issue.

Verdict for the defendant in error.

Campbell and *Patteson* for the plaintiff in error.
Scarlett and *Chitty* for the defendant in error.

Campbell obtained in the following *Hilary* Term a rule to shew cause why judgment should not be entered for the plaintiff *non obstante veredicto*. In the following *Easter* Term this rule was made absolute. (a)

(a) See Co. Litt. 295b. Com. Dig. Utlagary. (C. 1.) 2 Roll. Ab. 804. Utlagarie, fo. 1, 2, 3, 4. Brooke's Ab. Utlagarie, pl. 40. 2 Hale, P. C. 208. Bac. Ab. Outlawry, (F.) *Carter's* case, Cro. Jac. 464. *O'Kearny's* Case, Skin. Rep. 16. *Matthews v. Erbo*, 1 Ld. Raym. 349. *Hesse v. Wood*, 4 Taunt. 691. *Serocold v. Hampsey* reported in note to *Havelock v. Geddes*, 12 East, 624. *Richardson v. Robinson*, 5 Taunt. 309.

1825.

BRADFORD v. LEVY.

GUILDHALL,
Dec. 24.

THIS was an action on a policy of insurance on the ship *Dove*.

The first and second counts stated, that the ship by perils and dangers of the sea sprung a leak, and by means thereof was obliged to, and did put into *Vigo*, and that while she continued there, she was by force and arms, and against the will of the plaintiff, and the master and mariners, in a hostile manner seized and taken and kept and detained for 172 days in *Vigo*, by divers custom-house officers and certain other persons, then acting under the authority of the king of *Spain*, and 500*l.* while she was so detained were expended in and about the claiming, and endeavouring to recover the said ship, and by means of her being so detained, 500*l.* which would otherwise have accrued from the use of her, were wholly lost. The third and fourth counts stated the ship to have been lost by perils of the sea. The fifth and sixth counts stated the ship to have been lost by the fraud and barratry of the master.

The insurer of a ship is not liable for the expences incurred by the delay of the vessel, for the purpose of recovering her cargo, when detained under process of a foreign country, if the ship itself be not detained by the process. And the circumstances causing the detainer must be positively shown to have originated in the fraud of the master, in order to support an averment of loss by his barratry.

It appeared in evidence that the master finding that the manifest of the cargo, which had originally been made out, was incorrect, had procured a correct one. The former one, instead of being cancelled, was afterwards forwarded to *Vigo*, and the new one, under the notion that the ship would discharge at *Corunna*, was forwarded thither. The vessel was forced to put into *Vigo*, and there, in

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BRADFORD
v.
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consequence of her cargo not corresponding with the original manifest, a process was issued, under which the cargo was detained. It was, however, shewn that the ship might have proceeded immediately without the cargo. The court at *Vigo* ultimately ordered a part of the cargo to be sold, and the remainder was released, with which the ship left *Vigo*. A witness stated that he did not know, whether the incorrectness of the original manifest arose from mistake or not. The bill of particulars of the plaintiff's demand, merely set forth the costs incurred by the detention, and the account with the *British* consul for obtaining the vessel's release.

Scarlett and *Pollock* for the defendant, argued that the insurer could not be held liable for the expences incurred by this delay. That if the captain had chosen to stay to litigate a private cause of his own at *Vigo*, such delay could not have created a liability on the part of the insurer, and that the present case amounted to no more, inasmuch as the ship itself was not detained by the foreign process. And that the mistake with respect to the manifests could not be considered to constitute a barratry.

Marryat and *Abraham* for the plaintiff, insisted that it was clear from the case of *Carruthers v. Gray*, 3 Campb. 142. that the insurer was bound to make good the loss incurred by a detention under these circumstances. And that, supposing the detention lawful, the master's conduct clearly amounted to barratry.

ABBOTT Ld. C. J. In *Carruthers v. Gray*, the process was against the ship, which, therefore, could not have proceeded on her voyage. Here the ship might have proceeded on her voyage, if the captain had not chosen to stay for the purpose of recovering the cargo. This makes all the difference. Then as to the barratry, the witness says that he does not know whether the incorrectness of the manifest, was produced by mistake or not. In order to establish the barratry you must give positive proof of fraud.

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BRADFORD
v.
LEVY.

Plaintiff nonsuited.

Marryat and *Abraham* for the plaintiff.
Scarlett and *F. Pollock* for the defendant.

KOSTER v. INNES.

GUILDHALL,
Dec. 24.

THIS was an action on a policy of insurance on goods on board *La Virgine de la Solitude*, at and from *Leghorn* to *Lisbon*. The first count was for a loss by perils of the sea, the second count stated a loss by barratry.

In an action on a policy of insurance, where a loss is to be inferred from the want of intelligence, the plaintiff must distinctly prove that when the vessel left the port of outfit, she was bound upon the voyage insured.

The plaintiff sought to recover for a total loss. The evidence to shew that the vessel sailed for her port of destination, and that she was lost, was as follows: —

A packer resident at *Leghorn* was called, who proved that he was acquainted with one *Louis*

Quare, Whether the non-arrival of a ship at her port of destination is evidence of her loss, where the crew have been heard of after the vessel sailed, and after she is said to have been lost.

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Taurel, who resided there, and on whose account this policy was effected by the plaintiff. In *March* 1821, this witness, by the desire of *Taurel*, packed at his warehouse certain goods, consisting of silks, &c. to go by *La Virgine de la Solitude*. There was no address on the packages, but the witness was desired to deliver them to one *Antonio*, a boatman at *Leghorn*, which directions he complied with. This witness stated that he knew the ship *La Virgine de la Solitude* had arrived at *Leghorn*, and he had heard she was to sail for *Lisbon*. *Antonio*, the boatman, was then called, and stated that he received the packages from the first witness, and that he took them and delivered them by the direction of *Taurel* on board *La Virgine de la Solitude*. This was on the 11th or 12th of *March* 1821. This witness said he was acquainted with the captain of the vessel, and that he gave him a receipt for the goods (which was not produced). He stated that he had heard from *Taurel* and the captain, that the vessel was bound to *Lisbon*. On the 9th or 10th of *April* the witness saw the ship sail, and he heard a few days afterwards that the vessel was lost, but that the captain and crew were saved, but he had not seen any of them since the time they sailed. He stated that there were no other goods on board the *La Virgine de la Solitude*, but those shipped by *Taurel*.

Marryat and *Barnewall* for the defendant, contended that upon this evidence the action could not be sustained. First, that there was no sufficient proof of the averment in the declaration that the ship had sailed on the voyage insured. Secondly,

that the loss of the ship had not been proved by the best evidence the case would admit of. Where a vessel is proved, to have sailed on the voyage intended, and after a length of time does not arrive at her port of destination, and has never been heard of since, the presumption is that she has foundered at sea, and that the crew have perished, and no other evidence can be given of her loss; but there is no case, that has gone the length of saying that, the non-arrival of the ship at her port of destination is evidence of her loss, where it appears that the crew have been heard of after the vessel sailed, and after she is said to have been lost.

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v.
INNES.

Scarlett for the plaintiff, submitted that it was a question for the jury, whether they would not presume from the evidence that had been given, that the vessel was lost.

ABBOTT Ld. C. J. Yes, but the question is, how lost?

Scarlett. There is a count in this case for barratry, a declaration cannot be framed to meet every possible case of loss; the plaintiff cannot make the protest evidence, and it is impossible to compel the attendance of witnesses resident abroad.

ABBOTT Ld. C. J. I will leave the case to the jury if you wish it, but I have a very strong opinion upon it. The proof offered in support of the plaintiff's case, is less than I can remember or have

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ever read of. It is necessary that he should establish two things. First, that the vessel sailed from the port of *Leghorn* on the voyage insured. Secondly, that she was lost, *and lost* by the particular perils insured against, which the plaintiff has alleged in his declaration to be the cause of the loss. Now, as to the first point, there is no evidence that any bill of lading ever existed, or of any order to send these goods to *Lisbon*. I think that you have not made out this part of your case, and that it would be very dangerous indeed to allow a party to recover on such evidence. As to the second point, it may perhaps be assumed that there is evidence of the loss, but making such an assumption will be going further than has ever yet been done in cases of this description; but I rely less upon this than on the first point, namely, that there is no evidence that the ship ever sailed for the port of destination.

Nonsuit. (a)

Scarlett and *F. Pollock* for the plaintiff.*Marryatt* and *Barnewall* for the defendant.

(a) As to what is presumptive evidence of a total loss, see *Green v. Brown*, 2 Str. 1199. *Newby v. Read*, Park on Insurance, p. 106. 7th edit. *Twemlow v. Oswin*, 2 Campb. 85. *Houstman v. Thornton*, 1 Holt's N. P. C. 242.

That it must be proved (where a loss is to be inferred from the ship not being heard of) that when she left the port of outfit she was bound upon the voyage insured. See *Cohen v. Hinckley*, 2 Campb. 51.

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN C. P.

AT THE SITTINGS AFTER
MICHAELMAS TERM,
6 GEO. IV. 1825.

ADJOURNED SITTINGS AT WESTMINSTER.

POPLETT v. STOCKDALE.

WESTMINSTER,
Dec. 1.

ASSUMPSIT, on a special agreement to pay the plaintiff by a bill of exchange, the balance of an account for printing a certain book, called the "Memoirs of *Harriette Wilson*;" with counts for work and labour. The plaintiff was the printer, and the defendant the publisher of the work in question. The work was printed and published in numbers, and contained a history of the amours of a woman of pleasure, and of her adventures with persons of rank and distinction. On the covers of the separate numbers, several of which were put in evidence, were advertisements of obscene publications; and under the title of *Exhibits* were lists

The printer of an immoral and libellous work cannot maintain an action for his bill, against the publisher who employed him.

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POPLETT
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of the persons, anecdotes of whom were to be found in the respective numbers.

The case for the plaintiff having been proved,

Wilde Serjt. for the defendant was proceeding to point out the pernicious tendency of the work, when

BEST C. J. said, I must now take notice of the character of this book. It professes to be the history of a common prostitute, and to detail her real or pretended amours. I have no hesitation in saying, that no person who has contributed his assistance to the publication of such a work, can recover in a court of justice any compensation for labour so bestowed. The person who lends himself to the violation of the public morals and laws of the country, shall not have the assistance of those laws to carry into execution such a purpose. It would be strange, if a man could be fined and imprisoned for doing that, for which he could maintain an action at law. Every one who gives his aid to such a work, though as a servant, is responsible for the mischief of it. No man can doubt the double object of this work, the corruption of youth, in the first place, by the exhibition of licentious scenes; and the extortion of money from exalted individuals, by holding over them the fear of having themselves described as persons of immoral habits. I have no power here to punish these parties, but I will not consent, that the plaintiff shall have the assistance of this Court, to obtain remuneration for labour directed to such

scandalous purposes. The defendant is equally guilty, but I will not, as Lord *Kenyon* once said, sit here, to take an account between two robbers on *Hounslow Heath*.

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v.
STOCKDALE.

The plaintiff was nonsuited.

Vaughan Serjt. and *Chitty* for the plaintiff.
Wilde Serjt. for the defendant.

ANNE and ELIZABETH JENKINS v. BID-
DULPH, Esquire.

WESTMINSTER,
Dec. 5.

THIS was an action against the sheriff of *Herefordshire*, for a false return of *non sunt inventæ* to a *pluries capias ad respondendum*, issued against the plaintiffs, in consequence whereof judgment of waiver had been pronounced against the plaintiffs.

The enrolment of a lease under 1 & 2 G. 4. c. 52. s. 8., which enacts, that a deed so enrolled "shall be as good and available in law, and of the like force and effect in all respects, as if the same had been enrolled in any

In order to prove, that the plaintiffs had been dispossessed of lands, which they held as tenants in common, an enrolment of a lease under 1 & 2 G. 4. c. 52. s. 8. (a) was offered in evidence by *Taddy* Serjt.

of His Majesty's courts of record at *Westminster*, or as if a memorial of any such deed had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and tenements in the counties in which the same are situate," is not admissible as evidence of the deed, without proof of the execution.

(a) And be it further enacted, that every lease or deed of exchange to be executed pursuant to this act, shall be enrolled in the office of the auditor or auditors of His Majesty's land revenues, for the division or district within which the premises to which such demise or exchange shall respectively relate shall be situate, or if such premises shall be situate within the

1825.
 JENKINS
 v.
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for the plaintiffs, without proof of the execution of the deed; and he contended, that a lease so enrolled became a public document, in the same manner as a bargain and sale enrolled under 27 H. 8. c. 16., and relied on *Smartle v. Williams*, 1 Salk. 280.

Wilde Serjt. on the other side, argued that the enrolment was in no respect different from the case of deeds registered in the registry counties, in which cases the execution of the deeds was necessary to be proved.

BEST C. J. I am of opinion that the enrolment of the lease without proof of the execution is inadmissible.

Verdict for the plaintiffs.

Taddy Serjt. and *Abraham* for the plaintiffs.
Wilde Serjt. and *Cross* for the defendant.

division or district of more than one such auditor, then in the office of every such auditor, on payment of the usual fees for such enrolment; and that every such lease and deed of exchange when so enrolled, shall without any other enrolment or registry thereof be as good and available in law, and of the like force and effect in all respects, as if the same had been enrolled in any of His Majesty's courts of record at *Westminster*, or as if a memorial of any such lease or deed of exchange had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and tenements in the county or counties in which the same estates or any of them shall be situate, any act of parliament, law, practice or usage to the contrary in anywise notwithstanding.

1825.

ADJOURNED SITTINGS IN LONDON.

FRANCE v. LUCY.

GUILDHALL,
Dec. 14.

ACTION on a bill of exchange by the payee against the drawer.

In order to prove notice of the dishonour of the bill by the drawee, upon presentment for payment, the plaintiff's counsel called for a letter, the date of which he specified, and which he said contained such notice; and upon the non-production thereof, offered to give parol evidence of it's contents, no copy having been kept.

This was objected to by *Campbell* for the defendant, on the ground that the notice to produce was too general, and did not specify the particular letter called for.

The following was the part of the notice to produce, which applied to the present question.

"And also to produce all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration in this cause, and the debt sought to be recovered by the said plaintiff by this action."

BEST C. J. was of opinion that the notice was too vague; that it ought to have pointed out the particular letter required.

It was afterwards proved, that from the state of the defendant's dealings with the drawees of the

In order to let in secondary evidence of a letter, the notice to produce must specify the letter intended; notice to produce "all letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered;" is too general.

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 v.
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for the plaintiffs, without proof of the execution of the deed; and he contended, that a lease so enrolled became a public document, in the same manner as a bargain and sale enrolled under 27 H. 8. c. 16., and relied on *Smartle v. Williams*, 1 Salk. 280.

Wilde Serjt. on the other side, argued that the enrolment was in no respect different from the case of deeds registered in the registry counties, in which cases the execution of the deeds was necessary to be proved.

BEST C. J. I am of opinion that the enrolment of the lease without proof of the execution is inadmissible.

Verdict for the plaintiffs.

Taddy Serjt. and *Abraham* for the plaintiffs.
Wilde Serjt. and *Cross* for the defendant.

division or district of more than one such auditor, then in the office of every such auditor, on payment of the usual fees for such enrolment; and that every such lease and deed of exchange when so enrolled, shall without any other enrolment or registry thereof be as good and available in law, and of the like force and effect in all respects, as if the same had been enrolled in any of His Majesty's courts of record at *Westminster*, or as if a memorial of any such lease or deed of exchange had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and tenements in the county or counties in which the same estates or any of them shall be situate, any act of parliament, law, practice or usage to the contrary in anywise notwithstanding.

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ADJOURNED SITTINGS IN LONDON.

FRANCE v. LUCY.

GUILDHALL,
Dec. 14.

ACTION on a bill of exchange by the payee against the drawer.

In order to prove notice of the dishonour of the bill by the drawee, upon presentment for payment, the plaintiff's counsel called for a letter, the date of which he specified, and which he said contained such notice; and upon the non-production thereof, offered to give parol evidence of it's contents, no copy having been kept.

This was objected to by *Campbell* for the defendant, on the ground that the notice to produce was too general, and did not specify the particular letter called for.

The following was the part of the notice to produce, which applied to the present question.

"And also to produce all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration in this cause, and the debt sought to be recovered by the said plaintiff by this action."

BEST C. J. was of opinion that the notice was too vague; that it ought to have pointed out the particular letter required.

It was afterwards proved, that from the state of the defendant's dealings with the drawees of the

In order to let in secondary evidence of a letter, the notice to produce must specify the letter intended; notice to produce "all letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered;" is too general.

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bill, who were the defendant's bankers, he could have no reasonable expectation that the bill would be paid by them; when his Lordship said, that if the jury were of that opinion, the defendant was not entitled to notice of the non-payment. (a)

Verdict for the plaintiff.

Vaughan Serjt. and *Tyrwhitt* for the plaintiff.
Campbell and *Godson* for the defendant.

(a) *Claridge v. Dalton*, 4 M. & S. 226.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS AFTER

HILARY TERM,

7 GEO. IV. 1826.

SITTINGS AFTER TERM AT WESTMINSTER.

DOE dem. KNIGHT v. ROWE.

WESTMINSTER,
Feb. 14.

EJECTMENT on a forfeiture.

The lessor of the plaintiff, by lease dated the 20th *January* 1820, demised the premises sought to be recovered in this action to one *Jones*, for the term of ninety-nine years. *Jones* was subsequently

himself and the lessor, and in two-thirds of the value of the premises demised. The lessee had insured in his own name only, and as contended, to a less amount than two-thirds of the value of the premises; both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that the insurance was to be in two-thirds of the value of the premises. The lessor of the plaintiff had previously insured the premises at the same sum as the defendant: Held, that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude, he was doing all that was necessary or required of him, by insuring in his own name and to the amount insured, he could not recover for a forfeiture, though there was no dispensation, or release from the covenant.

Ejectment on a forfeiture for breach of covenant in a lease, wherein the lessee covenanted to insure in the joint names of

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discharged under the Insolvent Debtor's act, and the defendant was appointed the assignee of his estate and effects. The covenant, for the breach of which the lessor of the plaintiff claimed a right to re-enter, was as follows : —

“ And also, that he the said *John Leonard Jones*, his executors, administrators, and assigns, or some one of them, shall and will, at his and their own costs and charges, forthwith insure or cause to be insured upon the said messuages, tenements, and buildings, and upon all such other erections and buildings as shall or may, during the continuance of the said term hereby granted, be erected and built on the ground and premises hereby demised, or any part thereof, in two-thirds of the value thereof at the least, from loss or damage by fire, in the Sun Fire Insurance Office, or in some other respectable insurance-office for insurance from fire, in *the joint names of the said William Knight, his heirs and assigns, and the said John Leonard Jones, his executors, administrators, and assigns*; and from time to time during the continuance of this demise, the said *John Leonard Jones*, his executors, administrators, or assigns, shall and will renew and keep in force such policy or policies of insurance, and shall and will produce and shew the policy or policies of such insurance; and also the receipt or receipts for the premium and duty thereof from time to time, when thereunto requested by the said *William Knight*, his heirs or assigns.”

The defendant had insured the premises in his own name only, and not, as required by the covenant, in the joint names of himself and the lessor of the plaintiff. The sum for which the defendant

insured the premises was 800*l*. The lessor of the plaintiff endeavoured to shew (but on this point there was contradictory evidence) that this sum was less than two-thirds of the value of the premises.

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For the defendant, it was proved, that neither the lease nor counterpart had ever been out of the lessor of the plaintiff's possession, but that on one occasion, an abstract of the lease had been delivered by the lessor of the plaintiff to *Jones*, who was then desirous of raising money on the lease, in which abstract it was stated, that the tenant was to insure the premises in two-thirds of the value, but it did not state in whose name or names the policy was to be effected.

The lessor of the plaintiff in 1823, brought an ejectment against *Jones*, for a forfeiture, in non-payment of the rent, and for not insuring, but the ejectment was subsequently compromised, by payment of the rent and insurance. From *Christmas* 1823 to *Christmas* 1824, while *Jones* was in embarrassed circumstances, the plaintiff effected an assurance of these premises in his own name, and for the sum of 800*l*. The defendant insured the premises from *Christmas* 1824, at the same office and for the same sum, as the plaintiff had done in the preceding year.

Scarlett for the lessor of the plaintiff contended, that the evidence given on behalf of the defendant did not amount to a dispensation or release from the covenant, and could not bar the right of the lessor to re-enter for the breach.

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ABBOTT Ld. C. J. This is an action of ejectment brought by *Knight* to recover the possession of certain premises, on the ground of a forfeiture of the lease, by omitting to insure according to the covenants contained in it. This case is not to be decided on any notions of equitable rights, but strictly upon what may be the legal rights of the parties; and I am happy to think, that if the opinion I have formed as to the law is incorrect, there will be an opportunity hereafter of correcting it.

His Lordship then stated the evidence, and proceeded as follows: I am of opinion, that there is not in this case any dispensation or release from the covenant; nevertheless, if in this a case of forfeiture, the conduct of the lessor of the plaintiff has been such, as to induce a reasonable and cautious man to believe, that he would do all that was necessary or required of him, by insuring in his own name and to the amount which has been proved, I am of opinion that, in point of law, the lessor of the plaintiff is not entitled to your verdict. The question, therefore, for your consideration is, whether you think the conduct of the lessor of the plaintiff was such as to induce a reasonable and cautious man to conclude that he was doing all that was necessary or required of him, by insuring in his own name and to the amount proved? With a view to determining this question it is to be observed, that both parts of the lease remained with *Knight*; afterwards an application is made to him for an abstract of the lease, and then nothing is stated in that abstract as to the parties to be inserted in the policy of insurance. It then appears,

that pending an ejectment brought by *Knight* to recover these premises, (but which was subsequently compromised), and while *Jones* was in embarrassed circumstances, namely, from *Christmas* 1823 to *Christmas* 1824, *Knight* effected an insurance at the *Sun* Fire Office on these premises for 800*l.*, and at *Christmas* 1824 the defendant insured them at the same office, and for the same sum. The first point, therefore, you have to decide, is as respects the forfeiture, for not insuring in the joint names of the lessor of the plaintiff and the defendant. It is for you to say, whether *Knight* having delivered in the manner that has been mentioned, an abstract of the lease, not specifying therein that the insurance was to be effected in the joint names of the lessor and lessee, might not have led a reasonable man to suppose that it would be sufficient if the policy was effected in one name only. *Knight* might not have meant to deceive in this respect, but still if it would lead a reasonable man to the conclusion that has been stated, then as regards this ground of forfeiture, your verdict should be for the defendant.

The second point you have to consider is, as regards the forfeiture for not insuring in two-thirds of the value of the premises. And, here, if you should be of opinion that *Knight* by insuring in 1823 the premises for 800*l.*, would have led a reasonable man to suppose that 800*l.* was at least two-thirds of their value, then I am of opinion that your verdict on this second ground of forfeiture should be for the defendant. But, in point of fact, it is by no means clear that the defendant did not insure in two-thirds of the value of the premises,

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though certainly as to this there is contradictory testimony.

Verdict for the defendant.

Scarlett and Holt for the plaintiff.
Campbell for the defendant.

EXETER,
 Feb. 14.

JARMAIN v. ALGAR.

Action on the following undertaking,
 "Jarmain v. Flack. I hereby undertake to sign a bail-bond for the above defendant, in this action, either on a writ issued into *Sussex* or into *Middlesex*, when tendered to me, within one week from this date.
 J. A." It was averred in the declaration, that a bail-bond was tendered within a week from the date of this undertaking, and that defendant was requested to sign and execute it. The evidence was, that the defendant was applied to to sign a bail-bond within the week, and refused; but no bond was tendered for his signature, until after the week expired: Held, First, that this undertaking was not an agreement within the fourth section of the statute of frauds. Secondly, that the plaintiff had failed in proving that the bond was tendered as averred in the declaration, and, therefore, could not recover.

ASSUMPSIT.

The declaration was in substance as follows: That at the time of making the promise of the defendant hereinafter mentioned, one *G. F.* was indebted to the plaintiff in the sum of 34*l.*, and for the purpose of recovering said sum of the said *G. F.* by an action at law, the plaintiff had caused to be issued a *latitat* duly endorsed for bail for the sum of 34*l.*, at the suit of the said plaintiff against the said *G. F.*, and was about to cause the said *G. F.* to be arrested thereon at *Brighthelmstone*, in the county of *Sussex*, of which the defendant, on 8th of *August*, 1825, had notice. That afterwards, &c. in consideration, &c. that the plaintiff would forbear to arrest said *G. F.*, the defendant undertook to execute a bail bond for the said *G. F.*, upon process issued into *Sussex* or *Middlesex* against

said *G. F.*, at the suit of said plaintiff for the recovery of the said sum of money so due and owing from said *G. F.* to said plaintiff, when such bail bond should be tendered to said defendant in the suit within one week from time of making his said promise and undertaking. Averment, that plaintiff did forbear to arrest *G. F.* That afterwards, on the 13th of *August* in the same year, plaintiff caused to be issued a bill of *Middlesex*, indorsed for bail for the sum of *34l.* against said *G. F.* at suit of said plaintiff, and delivered the same to sheriff of *Middlesex*, of all which premises defendant had notice. That said sheriff of *Middlesex*, afterwards and before the return of the writ, and *within one week from the time of making said promise, &c. to wit, on, &c. at, &c. tendered to said defendant a bail bond conditioned for the appearance of said G. F. at the return, &c.; and then and there requested said defendant to sign and execute said bail bond*, according to the promise and undertaking of said defendant in that behalf. Breach, that defendant did not, nor would sign or execute the said bail bond when it was so tendered to him as aforesaid, nor at any other time, but wholly refused, &c. whereby, &c.

The following is a copy of the undertaking given by the defendant to the plaintiff's attorney.

“ *Jarman v. Flack.*

“ *Mr. James Rae,*

“ I hereby undertake to sign a bail bond for the above defendant in this action, either on a writ issued into *Sussex* or into *Middlesex*, when

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tendered to me within one week from this date.
 Oath for 34*l.* and upwards.

“ August 8th, 1825.

Jos. Algar.”

In order to support the averment in the declaration, that the bail bond was tendered to the defendant to be executed, within one week from the date of the agreement, the plaintiff proved that within five days of signing the agreement, the sheriff's officer, who had a warrant to arrest *Flack*, on a writ issued on the 13th of *August*, called upon the defendant, and requested him to execute the bail bond; no bond was produced or tendered to the defendant at that time, but the sheriff's officer had a bail bond with him ready to fill up. The defendant told the sheriff's officer that he should not execute the bail bond then, but would wait until *Flack* returned to town. After the expiration of a week from the date of the undertaking, a bail bond was tendered to the defendant for execution, and he refused to sign it.

Marryat and *H. I. Stephen* for the defendant, contended on two grounds, that the plaintiff could not recover: First, that this action was brought to charge the defendant upon a special promise to answer for the debt, default, or miscarriage of another, and was within the fourth section of the statute of frauds, *Kirkham v. Marter*, 2 B. & A. 613.; and if within the statute of frauds, then there was no sufficient note in writing, the consideration not being stated in the undertaking given in evidence, *Saunders v. Wakefield*, 4 B. & A. 595.

Secondly, even supposing that the statute does not apply to this case, still the plaintiff has failed in proving the allegation in the declaration, that the bond was tendered to the defendant to sign, within one week from the date of the undertaking. The plaintiff might have alleged a dispensation of the tender, and then the allegation would have been appropriate to the case proved, and he would have been entitled to recover, but the plaintiff is bound to strict proof of the allegation in the declaration, and having failed in that, he cannot recover.

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ABBOTT Ld. C. J. I am of opinion that this case is not within the statute of frauds. It is not an undertaking to answer for the debt, default, or miscarriage of another, and, therefore, as far as regards *this* objection the plaintiff is entitled to recover. (a) But the second objection, I am of opinion, is fatal; I think the defendant has failed in proving the tender.

Nonsuit.

Gurney and Talfourd for the plaintiff.
Marryat and H. I. Stephen for the defendant.

(a) See 1 Wm. Saund. 5th edit. 211 b. (i)

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WESTMINSTER,
Feb. 17.

REX v. SERJEANT and Others.

Indictment
against the
wife of *W. S.*
and Others,
for a conspi-
racy in pro-
curing *W. S.*
to marry:
Held, that
W. S. was not
a competent
witness in
support of the
prosecution.
Held, that
in all cases
where hus-
band and wife
are admissible
witnesses
against each
other, they are
also admissible
for each other.

INDICTMENT for a conspiracy. The first count stated in substance as follows: 'That before and at the time of the conspiracy, &c. hereinafter next mentioned, *Mary Anne Wrench*, then of, &c. spinster, and now called *Mary Anne Serjeant*, wife of *W. B. Serjeant*, of, &c. was a person of bad character and ill fame, and was a common prostitute, and the said *W. B. Serjeant* was an infant within the age of twenty-one years, to wit, of the age of seventeen years, to wit, at, &c. And the jurors, &c. do further present, that *Mary Anne Serjeant* and *P. D.* and *S. J.* well knowing the premises, unlawfully, &c. intending to injure the said *W. B. Serjeant*, and to defraud him of his property, and to bring him into public scandal, &c. on, &c. with force and arms, &c. at, &c. unlawfully and wickedly did conspire, &c. for the wicked intent and purpose aforesaid, to cause and procure a marriage to be had and solemnized between the said *W. B. Serjeant* and the said *Mary Anne*, by means of a false oath to be taken by the said *Mary Anne*, and by divers false pretences, &c. and without the licence, consent, or knowledge of *Anne Serjeant*, then and there being the mother of the said *W. B. Serjeant*, his father then and there being dead; and against the form of the statute, &c. And the jurors, &c. do further present, that the said *Mary Anne*, *P. D.*, and *S. J.*, in pursuance of the conspiracy, &c. between them had as aforesaid, did afterwards to wit, on, &c. at, &c.

persuade and prevail on the said said *W. B. Serjeant* to consent to marry her the said *Mary Anne*, and did afterwards to wit, on, &c. at, &c. by means of such persuasion, and by means of a false oath then and there taken by the said *Mary Anne* for the purpose of obtaining, and in order to obtain a licence for the solemnization of marriage between the said *W. B. Serjeant* and the said *Mary Anne*, and by divers other false pretences, &c. cause and procure the said *W. B. Serjeant* to marry the said *Mary Anne*, and a marriage by such licence was then and there accordingly solemnized between them, without the leave or licence or knowledge of the said *Anne Serjeant*, then and still being the mother of the said *W. B. Serjeant*, who then was such infant as aforesaid, contrary to the form of the statute, &c. There were other counts in the indictment varying from the above in setting forth the overt acts of conspiracy.

The marriage between the defendant *Mary Anne Wrench* and *W. B. Serjeant*, was subsequent to the passing of the marriage act of the 4 G. 4. c. 76.

Gurney proposed to call *W. B. Serjeant* as a witness in support of the prosecution, and cited Lord *Audley's* case, 3 Howell's St. Tr. 402., *Haagen Swendsen's* case, 14 Howell's St. Tr. 559., *Perry's* case, *Bristol*, 1794, 1 Hawk. c. 41. s. 13. edit. 1795, as in point.

Adolphus and *Thesiger* for the defendants objected, and contended that the husband was not a competent witness; that in the cases cited the wife had been allowed to be a witness against her husband, because there was a charge against the hus-

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 v.
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band of violence committed on her person, but that the exceptions from the general rule were confined to cases of this description. *Rex v. Locker*, 5 Esp. 107. is an express authority to shew that a wife is not a competent witness for a co-defendant in a case of conspiracy, where the acquittal of the co-defendant would enure to the acquittal of the husband.

ABBOTT Ld. C.J. There is no doubt but the wife was a competent witness in the cases which have been cited from the State Trials; and in the *King v. Perry*, a case of abduction tried before the late Chief Justice *Gibbs*, when Recorder of *Bristol*, the evidence of the wife was received. But these cases are very distinguishable from the present. The *King v. Locker*, has decided, that in an indictment for a conspiracy in procuring a lady, then a ward of chancery, to marry, the wife was not a competent witness for one of the co-defendants, if her evidence might enure to the acquittal of her husband. I think, therefore, upon the whole, it is the safest course in the present case not to receive the evidence of the husband. In the case tried before Lord Chief Justice *Gibbs*, to which I have alluded, the wife was called as a witness *for* her husband, and that learned Judge stated, that he could see no distinction between admitting a wife for or against her husband, that the principle was exactly the same, and I entirely concur in his opinion. The *King v. Perry*, was much talked about at the time, and Chief Justice *Gibbs* expressed his surprise that any doubt should have been entertained, that a wife

was in all cases a competent witness for her husband when admissible against him.

Verdict of guilty.

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 SERJEANT.

Gurney, Andrews, and Chitty for the prosecution.
Adolphus and Thesiger for the defendants.

MANN v. LOVEJOY.

WESTMINSTER,
 Feb. 18.

REPLEVIN. Cognizance by defendant, as bailiff of *Page*, for rent due, under a demise theretofore made. Pleas in bar, *non tenuit*, and *riens* in arrear.

There were other cognizances and pleas in bar, but these only became material; and there was no plea in bar by the defendant.

The plaintiff came into possession of the premises in *November* 1812, under an agreement for a lease, at the rent of 150*l.* a year, to be granted to him by one *Bartholomews*, who then had a term in the premises. *Bartholomews* afterwards, in *June* 1814, assigned his term to *Page*. It was proved that the plaintiffs had paid rent at the rate mentioned in the agreement to *Bartholomews*, before the assignment.

Where the occupier under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement, and the landlord may distrain.

Marryat and *Chitty* for the plaintiff, contended, that there was in this case no demise. The possession was taken under an instrument, amounting only to an agreement for a lease; and the occupation being under that express contract, no contract inconsistent with it, as a tenancy from year to year, evidenced by payment of rent, can be implied. Then if the holding is under a mere agree-

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LOVEJOY.

ment for a lease, there can be no distress; and they cited *Hegan v. Johnson*, 2 Taunt. 148. and *Dunk v. Hunter*, 5 B. & A. 322.

ABBOTT Ld. C. J. In *Dunk v. Hunter*, the judgment proceeded on the ground that, looking to the whole instrument, there was no fixed rent; and in neither of the cases cited had there been any payment of rent. In this case, certainly, the instrument of *November* 1812 does not amount to a demise; but the question is, whether, when there is a continued occupation, and payment of rent under such an agreement, this does not constitute a tenancy from year to year, on the terms of that agreement. Neither of the cases cited affect that question. In this case there has been a continued occupation, and a payment of the rent mentioned in the agreement; and these facts are not inconsistent with the agreement, but rather in affirmance of it. I am of opinion, that taking the agreement, and connecting it with the facts proved, there is a tenancy from year to year, at the rent mentioned in the agreement, which tenancy the defendant could not determine without giving notice, and on which he may distrain for rent. (a)

The counsel for the plaintiff then applied to be nonsuited, but ABBOTT Ld. C. J. was of opinion, that as it was the defendant's record, he had a right to a verdict.

Verdict for defendant on the first cognizance.

Marryat and Chitty for the plaintiff.

Scarlett and Campbell for the defendant.

(a) See the judgment of *Littleale J.*, in *Hamerton v. Stead*, 3 B. & C. 483.

In *Easter* Term following *Chitty* applied for a rule to shew cause why there should not be a new trial, on the ground that no tenancy was proved, or why the verdict should not be set aside, or a nonsuit entered, as was contended for by the plaintiff's counsel at the trial.

The Court refused the rule on the first point, being of opinion that the tenancy was proved, but granted the rule for entering a nonsuit, which has since been made absolute. (a)

(a) As to this point, see 5 Barn. & Cress. Rep.

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v.
LOVEJOY.

Where the plaintiff in replevin does not appear, the defendant cannot take a verdict, though the record be brought down by his writ of *Nisi Prius*, but a nonsuit must be entered.

ADJOURNED SITTINGS IN LONDON.

PIZEY v. ROGERS.

GUILDHALL,
Feb. 25.

ASSUMPSIT. This action was brought to recover a moiety of the expence of building a party-wall, under the provisions of the 14 G. 3, c. 78.

It appeared that the plaintiff was tenant to the defendant of a freehold messuage in *Lawrence Pountney Lane, Cannon Street*, and held the same by lease, dated the 11th *March* 1816, from the defendant to one *Engstrom*, for twenty-one years, at the yearly rent of 80*l.*, in which *Engstrom* covenanted to repair the premises during the term, with all manner of needful and necessary reparations and amendments whatsoever (casualties by fire only excepted.) In *February* 1818, *Engstrom*

himself and the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority.

A tenant under covenant to repair, cannot maintain an action on the 14 G. 3, c. 78. (the *London building act*) against his landlord, for a moiety of the expence of rebuilding a party-wall, which being out of repair, the tenant pulled down and re-built at the joint expence of

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v.

ROGERS.

assigned his interest to the plaintiff who entered, and is now in possession under the lease. It was proved that the party-wall of the plaintiff's house was very much out of repair, and in some danger of falling down; that the plaintiff, without the authority of the defendant, gave a notice in his name, according to the form pointed out by the statute (*a*), to the owner of the adjoining house.

(*a*) The stat. 14 G. 3. c. 78. s. 38. provides, that every owner of a house who shall think it necessary to pull down and rebuild any party-wall, in case the owner of the adjoining house will not agree touching the same, shall give three months' notice in writing to the owner if known, or otherwise to the occupier of such adjoining house, of such his intention, by delivering a copy of such notice, &c. (in which notice is given of the intention of having the party-wall surveyed, naming his surveyors, and the time of attendance, and requiring the other owner to appoint two other surveyors to meet them at the appointed time and place, to certify the state and condition of the party-wall, &c.); and that every such owner or occupier of the adjoining house shall appoint two surveyors to meet the other surveyors to view and certify, &c.; or in default of such nomination, the party giving the notice shall name two other surveyors to meet those named in the notice, who are to meet, view, and certify the same to the justices at the quarter sessions, &c. And if the majority of the surveyors certify that the party-wall ought to be repaired or pulled down, a copy of their certificate is to be delivered to the owner or occupier of the adjoining house, and filed with the clerk of the peace, and an appeal is given to such owner, &c. And if there be no appeal, or the certificate be confirmed on appeal, the party giving notice may in fourteen days after delivering a copy of such certificate as therein mentioned, pull down and rebuild the party-wall, and enter the adjoining house, and remove the wainscoat, furniture, &c. and shore up the house, and rebuild the party-wall, &c. And section 41. directs how the expences of the party so rebuilding are to be reim-

The plaintiff and the tenant of the adjoining house, at their joint expence, rebuilt the wall; the plaintiff's moiety of such expence amounted to the sum of 424*l.*, which he sought to recover from the defendant in the present action.

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Marryat for the defendant, contended, that the expence was incurred by the act of the tenant, and not in pursuance of the provisions of the statute; that the tenant, under the covenant of his lease, was bound to repair, uphold, and support the demised premises, and, therefore, was liable to all expences of repairing, except so far as the 14 *G. 3.*

bursed by the owner of the adjoining house; and particularly that the owner or occupier of the adjoining house shall, together with a proportional part of the expence of building the party-wall, "also pay a proportional part of all other expences which shall be necessary to the pulling down the old party-wall, &c.; and the whole of all the reasonable expences of shoring up such adjoining house, and of removing any goods, furniture, or other things, and of pulling down any wainscot or partition, and also all costs, if any, awarded by the sessions, &c." It then directs, that within ten days, &c. after such party-wall shall be so built, such first builder shall leave at such adjoining house a true account in writing of so much thereof for which the owner of such adjoining house shall be liable to pay; and also an account of such other expences and costs, "whereupon it shall be lawful for the tenant or occupier of such adjoining building, to pay such proportional part as aforesaid to such first builder, and also for shoring such adjoining building, and for all such other expences as are hereinbefore directed to be paid by the owner of such adjoining building, and to deduct the same out of his rent, &c. until he shall be reimbursed." And if the expences be not paid within twenty-one days after demand, a remedy is given against the owner by action of debt, or on the case.

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c. 78. had shifted the burthen ; and that the statute did not apply to the present case. *Robinson v. Lewis*, 10 East, 227. was an express authority.

ABBOTT Ld. C. J. I am of opinion, on the evidence which has been given, that the tenant cannot call upon his landlord to pay the moiety of the expences incurred in the erection of this party-wall. The statute is not applicable to this case, and the plaintiff must, therefore, be nonsuited.

Nonsuit.

Scarlett and Chitty for the plaintiff.
Marryat and Campbell for the defendant.

GUILDHALL,
Feb. 24.

EDWARDS v. YEATES.

Semble, that a letter demanding payment of a debt, sent by the plaintiff's attorney, and received by the defendant, is not sufficient evidence of a demand, on the issue of a prior demand and refusal to a plea of tender. *Semble*, that the demand should be personal, that the plaintiff may have an opportunity at the time, of paying the money demanded.

ASSUMPSIT. Plea, as to all but the sum of 7l. 19s. 8d., *non-assumpsit*, and as to that a tender. Replication to the plea of tender, a prior demand and refusal. Rejoinder, taking issue on the demand. The plaintiff, in order to prove that a demand was made of the precise sum before it was tendered, gave in evidence a letter written by his attorney, and received by the defendant, requesting him to pay to the plaintiff the sum of 7l. 19s. 8d.

Brougham for the defendant, contended, that the demand ought to be made personally, and not

by letter; that the person to whom the application was made might have the opportunity at the time of paying the money demanded. *Coles v. Bell*, 1 Campb. 478 n.

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EDWARDS
v.
YEATES:

Scotland for the plaintiff. The issue, on this evidence, ought to be found for the plaintiff. It has been expressly decided, in *Hayward v. Hague*, 4 Esp. N. P. C. 98., that it is not necessary to make a personal demand of the money.

ABBOTT Ld. C. J. I should be very sorry to differ from Mr. Justice *Lawrence*, who decided that case; but I own I have a very strong opinion against considering a *letter* written by the plaintiff's attorney, demanding the sum tendered, as evidence of a demand to support the plaintiff's issue. I think, that at the time of the demand, the defendant should have an opportunity of paying the money demanded. Under all the circumstances of this case I should advise the parties to withdraw a juror.

A juror was accordingly withdrawn.

Scotland for the plaintiff.

Brougham for the defendant.

1926.

GUTHRIE,
Feb. 25.

MACINTOSH v. HAYDON.

The drawer of a bill of exchange accepted generally (after the 1 & 2 G. 4. c. 78.) added the words, "payable at Ransom and Co., bankers, London," without the knowledge of the acceptor, and then indorsed it for valuable consideration, the bill being over due, and the indorsee privy to the alteration: Held, that the acceptor was discharged.

THIS was an action by the indorsee against the acceptor of a bill of exchange drawn by *F. Unwin*, and payable to his order.

The declaration alleged a general acceptance.

It appeared in proof, that after the bill became due, *Unwin* applied to the plaintiff to advance money on the bill; the plaintiff objected because the bill was not accepted payable at a banker's; upon which *Unwin* wrote under the defendant's acceptance, the words "Payable at Messrs. Ransom and Co. bankers, London," and the plaintiff took the bill. The bill was drawn after the passing of 1 & 2 G. 4. c. 78., and the defendant was not privy to the alteration.

It was contended for the defence, that this alteration of the bill discharged the acceptor, inasmuch as it added a new obligation, namely, an undertaking to pay at a particular place, and entailed all the liabilities arising out of a default at a particular place. The case of *Cowie v. Hatsall*, 4 B. & A. 197. which occurred before the statute, was referred to.

Gurney for the plaintiff, argued that since the statute the alteration is immaterial, the situation of the acceptor being the same under an acceptance of this form, as under a general one, and that as no demand was necessary against an acceptor, the party could not be in any way prejudiced.

ABBOTT Ld. C. J. It is quite true that in strict law no demand is necessary against an acceptor, but in practice a demand is usual, and ought to be made before proceedings are instituted; and it might make a material difference in the costs, if a solvent acceptor, against whom proceedings had been instituted without a demand, were promptly to apply to the Court. But it would, perhaps, be going too far to say that in this view only, the alteration would be so far material as to vitiate the bill; but there is another view in which the words added, materially alter the character of the bill. Suppose the indorsee, who was cognizant of such an alteration, were to pass the bill whilst current, to another person, without communicating the fact, and he to a third. The right of the last indorsee to sue his immediate indorser would, as the bill appears, be complete upon default made at the bankers, and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. I am of opinion, therefore, that the alteration is in a material part of the bill, and the defendant is in consequence discharged.

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MACINTOSH
v.
HAYDON.

Nonsuit. (a)

Gurney for the plaintiff.

Marryat and *Chitty* for the defendant.

(a) *Tidmarsh v. Grover*, 1 M. & S. 735.

1885.

GUILDHALL,
March 3.STONE and Another v. MARSH, STRACEY
and GRAHAM.

Payment by
bankers to
one of several
trustees, of
the proceeds
of stock sold
out under a
joint power of
attorney from
the trustees,
does not dis-
charge the
bankers as
against the
other trustees,
unless pre-
viously au-
thorized by
them.

THIS was an issue directed by the Lord Chancellor to try whether, before and at the date and suing forth of certain commissions of bankrupt, or of either of them, that is to say, a certain commission against the defendants, dated the 16th of *September* 1824, and a certain commission against *Henry Fauntleroy*, dated the 29th *October* 1824, the said defendants, and the said *Henry Fauntleroy* were indebted to the plaintiffs, in the sum of 16,000*l.*, or in any and what sum.

The parties were prohibited by the Chancellor's order from taking any objection to the final determination of the issue, on the ground that the said *Henry Fauntleroy* was interested as a trustee jointly with the said plaintiffs, and also as a partner with the said defendants; and power was given to examine the parties as witnesses.

The plaintiffs and *Henry Fauntleroy* were joint trustees under the will of Sir *T. B. Plaistow*, and had amongst other property the sum of 17,601*l.* navy five *per cents.* standing in their joint names. The defendants *Marsh*, *Stracey*, and *Graham* were bankers, in partnership with *Fauntleroy*, and conducted their business in *Berner's Street, Westminster*. The bankruptcy of the defendants arose out of the discovery of forgeries, to an immense amount, committed by *Fauntleroy*, of powers of attorney to sell out stock, for one of which forgeries

he was executed. Up to the time of these disclosures the business and credit of the house had been extensive.

The claim of the plaintiffs was for 16,000*l.*, the proceeds of the sale of part of the stock standing in the joint names of them and *Fauntleroy*, under a power of attorney forged by *Fauntleroy*, which proceeds, it was contended, had come into the possession and use of the defendants.

For the plaintiffs it was proved, that the stock had been sold out by a *London* broker, under orders received from the house in *Berner's Street*, in two several sums, one on the 26th *May* 1819, producing 7105*l.*; the other on the 28th of *May* 1819, producing 8904*l.* 17*s.* 8*d.* The demand to act on the power of attorney, (which professed to authorize the partners, or either of them, to sell out the stock,) was in the hand-writing of *Stracey*. The receipt for the first sum was signed by *Stracey*, as attorney to the trustees, that for the second by *Graham*. The proceeds were paid by the broker into the banking house of *Martin* and Co., in the city, on account of the house in *Berner's Street*, and an account was rendered by the broker to *Marsh* and Co., giving them credit for half the brokerage on the sales. *Martin* and Co. were the city bankers of *Marsh* and Co., and a regular pass-book was kept, in which *Marsh* and Co. were credited by *Martin* and Co. for the proceeds paid in by the broker.

A paper in *Graham's* hand-writing was found in *Faulstich's* desk, of which the following is a copy:—

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 Stone
 v.
 Marsh.

"26th May 1819. 15,000*l.* odd, navy *ss.* 7,103*l.* paid to *Martin* and Co. on the 26th, and on the 28th 8,900*l.*, to make up the account to raise 16,000*l.*, money of *H. F., Dehagan & Stone.*"

The account rendered by the broker was also found in the house.

For the defendants it was shewn, that the power of attorney was forged by *Fauntleroy*; that he had exercised the principal controul and management of the affairs of the bank, and that though the money had been paid into *Martin* and Co., it had, in fact, never been paid into the house in *Berner's Street*, *Fauntleroy* having contrived to intercept it, and to keep the defendants in ignorance of the real application of the moneys received. That the mode of business was, for the accounts with *Martin* and Co. to be transferred from the pass-book into a book called the house-book kept in *Berner's Street*; that this had always been done by *Fauntleroy*, the partners relying on the house-book in which the accounts were apparently correct, and corresponded with the other books in which the clerks and the partners usually made their entries. That by keeping the pass-book as much as possible out of their view, he had defrauded the partnership; and, in fact, there were deficiencies to their loss of more than 100,000*l.* An accountant, who had been employed by the assignees to examine the books of the bankrupts, stated that in the course of ten years there were entries in the pass-book of sums paid in to *Martin* and Co. to the credit of *Marsh* and Co., to the amount of upwards of 500,000*l.*,

none of which appeared in the house-book; that on the other hand there were entries in the house-book, of sums to the amount of upwards of 370,000*l.* as paid by the partnership to *Martin* and Co., none of which appeared in the pass-book as really paid. All the defendants were examined, and stated that they had interfered but little with the business, and had relied altogether on the knowledge of business and honesty of *Fauntleroy*, who always sent into the city to the bank of *England*, the powers of attorney to be passed, and that the partner who happened to be in the city at any particular time, as matter of course acted on the powers of attorney found at the bank; and authorized the broker to effect the sales, and receive the proceeds. That they had no recollection, or knowledge of this particular transaction, beyond what appeared on the papers. Only one instance was shewn of an entry in the pass-book by any other partner than *Fauntleroy*.

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Stowe
v.
Mason.

The plaintiffs were indemnified by the bank of *England*, who had engaged to replace the stock to their credit, on condition of the plaintiffs pursuing their claim for a dividend, against the assignees of the defendants.

Upon these facts it was contended for the plaintiffs, that the defendants had, in fact, received money, the produce of the property of the plaintiffs; that the moment the money was paid to *Martin* and Co., the recognized agents of the defendants, the defendants became accountable, and could not relieve themselves otherwise than by shewing the application of the money, to the use of all the trustees, out of whose funds it had come; that the

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v.

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defendants could not set up as a defence their own negligence, in allowing one of their partners to appropriate it; nor could they be allowed to say that it had been acquired by a felony of one of the partnership.

For the defendants it was urged : — First, that no debt could be founded on and arise out of a felony; that the party whose name had been forged could not adopt, and recognize the forgery so as to found a civil right upon it, it being against the policy of the criminal law to allow the party affected by a felony, in any way to sanction or turn it to his advantage.

Secondly, that, in point of fact, the plaintiffs had not been injured, and had not lost their property, inasmuch as the transfer under a forged power worked no alteration of property; and that they, therefore, still remained owners of the stock, and could call upon the bank of *England* to answer for both the principal and dividends. *Davis v. Bank of England*, 2 Bingham 393.

Thirdly, that even if the defendants were fixed by the payment of the money to *Martin and Co.* on their account, still that they were discharged by the repayment of it to *Fauntleroy*, one of the parties whose property it was, and into whose hands and use it appeared by the evidence to have come.

ABBOTT Ld. C. J. In summing up to the jury. The question in this case has evidently arisen out of the forgery of this power of attorney; but as the considerations on that point are entirely mat-

ter of law, and involve very great difficulty, I think the parties ought to have the benefit of more mature deliberation than can be given here to that point. The only way that this question can be put to you, is to assume that the power is valid, and then see whether or no the defendants are answerable for this sum of money; and we must view the question as if the same person were not answerable on both sides. Now taking this power as valid, you find that it authorizes all and each of the partners to act upon it; that two of them do in fact act; each signs the receipt for the part transferred by him; the broker receives the money and pays it to *Martin and Co.*, to the credit of *Marsh and Co.*, and sends the account to *Marsh and Co.* Upon these facts the money most unquestionably was paid to *Marsh and Co.* or to their credit. But then it is said that they are not answerable, because, by their peculiar, and extraordinary mode of conducting their business, the money never found its way to their use. That may be good, as between them and *Fauntleroy*, but as between them and the plaintiffs it cannot by possibility be any defence, that they have suffered one of their own partners to embezzle it. But they say, also, that *Fauntleroy* was one of the persons entitled, and that he has drawn it out, and, therefore, they are not answerable. Now if two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their joint account, and both ought to draw. If it is meant that the money should be paid to one, an authority ought to be given to that effect to the bankers: that, in

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STONE

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v.

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my experience, has been the ordinary practice. If you are of opinion that this is the usual mode of dealing, then, as against the other two, it is no defence that the payment has been made to one only of several who are jointly entitled to receive it. If, according to the ordinary course of business, he was not solely entitled to receive this money, then payment to him is no discharge, and you will find your verdict accordingly.

Verdict for plaintiffs 16,000*l*.

The Attorney-General, Bosanquet Serjt., Bolland, and Tindal for the plaintiffs.

Scarlett, Gurney, Campbell, and F. Pollock for the defendants.

CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN C. P.

AT THE SITTINGS AFTER

HILARY TERM,

7 GEO. IV. 1826.

ADJOURNED SITTINGS IN LONDON.

HUME and Another *v.* BOLLAND and Others,
Assignees of the Estate and Effects of WIL-
LIAM MARSH, JOSIAS HENRY STRA-
CEY, GEORGE EDWARD GRAHAM,
and HENRY FAUNTLEROY, Bankrupts.

GUILDHALL,
Feb. 24.

THIS was an issue directed by the Lord Chan-
cellor to try, whether at the date and suing forth
of the commissions of bankruptcy therein men-
tioned, that is to say, that against the three first
bankrupts, dated 16th of *September* 1824, and that
against *Fauntleroy*, 29th *October* 1824, the said
the dividends as received, and had allowed them to draw without having any other
funds in their hands: Held, that the bankers were bound by the entries so acted
on, though not communicated, and that they could not set up as a defence, that
the entries had been fraudulently made by one of the partners, the money never
having been received by the house.

Where
bankers em-
ployed to
receive divi-
dends in the
funds, had in
their own
books credited
their em-
ployers with

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bankrupts were indebted to the said plaintiffs and *Henry Fauntleroy*, as trustees under a certain deed therein mentioned, in the sum of 1177*l.* 16*s.* 6*d.*, or in any other, and what sum.

The Lord Chancellor's order prohibited the parties from taking any objection to the final determination of the issue, on the ground that *Henry Fauntleroy* was interested jointly with the plaintiffs as a trustee, and jointly with the bankrupts as a partner.

The bankrupts carried on business in partnership as bankers, in *Berner's Street, Westminster*, and up to the time of their failure were in high and extensive credit.

The plaintiffs and *Henry Fauntleroy*, one of the bankrupts, by deed of the 9th *August* 1810, stood possessed of certain sums standing in their joint names, in the public funds, which are specified in the account mentioned below, in trust, to pay the dividends on the same to Colonel *Bellis*, in his lifetime, and after his death upon certain trusts, for the benefit of his widow and children, of whom *Frances*, *Emily*, and *Eliza* were three.

Fauntleroy acted alone in the trusts of this deed, and, during the life of Colonel *Bellis*, kept an account with him, and the dividends were regularly paid as they became due; at his death, which took place on the 23d *January* 1824, an account was opened in the books of the banking-house, entitled, "The trustees of *Bellis*, in account with *Marsh* and Co.;" and several sums of money were from time to time placed to the credit of the trustees, in respect of the dividends on the several sums in the public funds, and they were from time to time debited with the several sums of money paid by *Fauntleroy*, in execution of the trusts of the said deed.

In the beginning of *September* 1824, it was discovered by the plaintiffs, who had not before interfered with the trust property, that all the stock vested in them and *Fauntleroy* by the trust deeds, except 6000*l.* consols, had been sold out by *Fauntleroy*, under forged powers of attorney. The dates of the sales did not appear, but it was admitted that they were previous to the accruing of the dividends in question. Upon this discovery further investigations took place at the Bank of *England*, and similar forgeries by *Fauntleroy* to an enormous amount were discovered, and for one of them he was executed on the 30th *Nov.* 1824.

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BOLLAND.

The defendants, upon application by the solicitor of the plaintiffs, had rendered the following account, as standing in the bankrupts' books at the time of the bankruptcy.

The Trustees of BELLIS (in Account with MARSH and Co.)

1824.	£.	s.	d.	1824.	£.	s.	d.
April 29th Fra ^r . Bellis - - -	10	0	0	April 9th Div ^d . 5300. 4 per cents	106	0	0
Eliza do. - - -	10	0	0	Do. 4600. Red ^d . 3 per cents.	690	0	0
30th B P. Bill - - -	20	0	0	July 9th Do. 10,000 Imperial 3 per cents - - -	150	0	0
June 16th Stamps - - -	0	4	6	Do. 18,375. 4 per cents - - -	367	10	0
Emily Bellis - - -	20	0	0	Do. 6000. 3 per cents	90	0	0
Do. - - -	20	0	0				
Fra ^r . do. - - -	20	0	0				
Aug. 10th Emily do. - - -	20	0	0				
Fra ^r . do. - - -	95	6	0				
Eliza do. - - -	10	0	0				
Stamp - - -	0	3	0				
Sept. 13th To Balance - - -	1177	16	6				
	1408	10	0		1408	10	0
				Sept. 13th By Balance - - -	1177	16	6

Of the dividends mentioned in this account, that on the 6000*l.* 3 per cents, was the only one really received by the bank.

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BOLLAND.

The entries in the receiving day books, crediting the trustees for the dividends, from which the book containing the account was made up, were mostly in *Fauntleroy's* hand-writing, one was in that of a clerk.

For the plaintiffs it was contended, that the bankrupts having given credit in their books for the dividends, and having allowed the persons beneficially interested to draw upon the faith of them, were precluded from denying the receipt of the money. That *Fauntleroy* acted in the character of partner in the house, in making the entries of dividends received, and in allowing the payments: that the partners were bound by his dealings with their customers in the ordinary course of business, and could not be allowed to set up their own negligence as a defence against the liabilities induced by his conduct. *Shaw v. Picton*, 4 B. & C. 715., *Rapp v. Latham*, 2 B. & A. 795., *Skyring v. Greenwood*, 4 B. & C. 281., *Sandilands v. Marsh*, 2 B. & A. 673.

For the defence it was urged, that the partners were not bound by *Fauntleroy's* acts; that he had received the dividends and dealt with them as a trustee, no power of attorney having been given to the house to receive the dividends; and that as *Fauntleroy* had not, in fact, paid those for which he had debited the house, they were not responsible. That *Fauntleroy* had, in fact, had the management and controul of the business of the bank, and that this was known to the plaintiffs. That the plaintiffs were equally bound by *Fauntleroy's* acts, and had been negligent in not taking care to see that the stock continued in their names; no part of the proceeds of which had reached the bank. That the

defendants were not bound by the entries in their own books, unless communicated to the parties interested. *Simson v. Ingham*, 2 B. & C. 65. (a) And in this case the entries were false in fact, and so made by *Fauntleroy*, in fraud of the other partners. That there were only two modes in which a legal claim could be established against the house, either as for money had and received, which was negatived by the evidence, or by an account stated, which was also negatived, as the entries had not been communicated.

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v.
BOLLAND.

It was also contended, that the plaintiffs had still their remedy both for the stock and the dividends against the Bank of *England*, the transfer under a forged power of attorney being void. *Davis v. England*, 2 Bingham 393. And it was proved that the Bank of *England* had engaged to indemnify the plaintiffs for both, in case they did all they could to procure a dividend from the assignees for the benefit of the Bank.

The plaintiffs witnesses, and the clerks in the banking house had been cross-examined in order to explain the mode by which the books and business of the house had been conducted, and the false entries were traced through the different books in such a way, as to shew that wherever a false entry of a receipt was made, there was a corresponding false one of a payment, and the balance book on which the partners entirely relied, always shewed a clear and correct account.

BEST C.J. in summing up to the jury, after stating the issue, said the plaintiffs are entitled to

(a) See also *Ex parte Pease*, 19 Ves. 25.

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the whole of the money or none. It is not necessary to consider in this case what may be the effect of a transfer under a forged power of attorney, or the right to the stock transferred; if it were, I should certainly act on the recent decision in this Court. This Court has determined that such a transfer is entirely void, and makes no alteration in the property of the stock transferred, and after what has recently passed (*a*), it may be proper to state, that there is no disposition in any of the Judges who decided that case to recede from their opinion. In this case, the first question for your consideration will be, in what character *Fauntleroy* acted in the disposition of these dividends, or pretended dividends; whether as trustee merely, or as a partner in the banking-house. That he received these dividends, or pretended to receive them as a trustee merely, there can be no doubt. No power of attorney to the house was given or was necessary to enable him to receive them, but if he pretended afterwards to dispose of them in his character of a partner, and the partners by their conduct have adopted and sanctioned his acts, they are undoubtedly liable. That *Fauntleroy* gave his co-trustees to understand that he had received this money is clear; if he did this in the character of a partner in the house, the house is bound; if you give a man to understand that you have received money on his account, he has a right to act upon that understanding. Now

(*a*) The judgment of the Court of Common Pleas in *Davis v. The Bank of England*, has been reversed in the King's Bench for the insufficiency of one of the counts in the declaration, not noticed in the arguments in this Court.

you find that throughout this business, the house have in their own books dealt with this as money received; the entries of dividends to the credit of the trustees, are traced from book to book. I fully agree with the case of *Simson v. Ingham*; in that case it was rightly held that parties are not bound by their uncommunicated entries; but here you find payments made to the trustees on the credit of them; when that was done, the trustees had a right to consider the money as received by the bank, and might have arrested the partners for it. Whether they knew or not of these entries, they are bound by them when so acted on; they ought to have known of them, and are responsible for them. If you believe that *Fauntleroy* dealt with this supposed money with the assent of his partners, your verdict must be for the plaintiffs; but as other questions have been raised, which may be material in the Court from whence this case comes, I will take your opinion whether, first, the plaintiffs as trustees have been guilty of any negligence; secondly, whether the partners have been guilty of negligence.

The jury returned a verdict, that *Fauntleroy* dealt with these dividends as a partner in the house, and with the assent of his partners; that the plaintiffs were guilty of no negligence; that the partners were guilty of gross negligence.

Verdict for the plaintiffs, 1177l. 16s. 6d.

Adams Serjt., *Tindal*, *Turner* and *Rogers* for the plaintiffs.

Wilde Serjt., *Campbell* and *F. Pollock* for the defendants.

1826.

GUILDHALL,
March 1.POINGDESTRE *v.* the Corporation of the
ROYAL EXCHANGE.

Where a ship partially damaged, has been repaired by the owners, the insurers are only liable to the amount of two-thirds of the cost of repair, unless circumstances be shown to take the case out of the ordinary rule of deduction of one-third for the benefit to the owners from the repairs.

THIS was an action on a policy of insurance on the ship *Glaiton*. The ship had suffered a partial loss on the voyage insured, and had been repaired. The defendants had paid two-thirds of the costs of repairs.

The only question in the cause was stated in the admission agreed upon by the parties, as follows : —
“ That in making up the statement, on which the sum paid by the defendants was calculated, a deduction of one-third of the costs of the repairs done to the ship, had been made, being, as the defendants contend, the usual deduction, made for the benefit derived by a ship-owner from the repairs of a ship, and commonly termed a deduction of *new* for *old*, and the right to which deduction is the only question to be tried ; and the verdict is to be for the plaintiff or defendants, according to the determination of such right.”

The ship was ten years old, and had, just before the voyage, undergone a thorough repair, and on her return was again completely repaired. The damage done was chiefly in the new part in the first repair. A vessel so repaired was stated to be capable of five or six voyages ; and on her second repair she was as complete as on her first.

The plaintiff contended, that this was similar to a case in which a new ship, or one newly repaired, should be damaged in going down the river, and put back to repair, when a deduction of one-third,

or any deduction, would be manifestly unjust, and indeed did not obtain in practice.

For the defendants it was urged, that the mode of calculating average, by deducting one-third of the repair was the constant usage, according to which the parties must be taken to contract; that it was a rule framed with a view to avoid the difficulty of calculating minutely, the actual benefit to the owner from the repairs in every case. *Da Costa v. Newnham*, 2 T. R. 407., *Palmer v. Blackburn*, 1 Bing. 61., *Stevens on Average*, 158.

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v.
The Corporation of
the ROYAL
EXCHANGE.

On *Bosanquet* Serjt. proposing to call merchants and insurers to prove the usage, *BEST* C. J. interposed and said, that it would scarcely be insisted by the plaintiff, that witnesses should be called to establish that usage before a special jury of *London*, every one of whom must be perfectly cognizant of the fact of the usage. The jury assented to this, and the Lord Chief Justice then said — It is quite notorious that the rule in practice to ascertain the rate of indemnity, is that which has been adopted in this case; that rule is not one of law, nor is it universal; but in ordinary cases it is impossible to have proof of the actual deterioration of the vessel by the wear and tear of a voyage; unless, therefore, you see any thing in this case to take it out of the rule, you ought to act on it.

Verdict for the defendants.

Taddy Serjt. and *Maule* for the plaintiff.

Bosanquet Serjt. and *W. Kaye* for the defendants.

1826.

GUILDHALL,
March 2.

DOE dem. LEWIS v. COLES.

The plaintiff in ejectment has a right to an amendment of the record, upon payment of costs of the application, against a defendant, who refuses to give up the possession. If the defendant consents to give up possession, the plaintiff must pay the whole costs, up to the time of the application.

THIS was an ejectment to recover certain premises, stated in the recital of the writ to be in the parish of *St. Andrew in the Wardrobe*, in the city of *London*. The demise was stated to be made at the parish aforesaid, in the *county* aforesaid.

Before the cause was called on, *Taddy* Serjt. applied to amend the record in this respect; and on the application being resisted by *Vaughan* Serjt., BEST C. J. said — The amendment does not appear to me to be necessary; but if you have come down to trial merely upon this formal defence, I will not allow the plaintiff to amend, but upon terms of paying your costs up to this time, and upon your giving up possession. If you have a real defence you will not be prejudiced by the amendment, and the plaintiff must pay the costs of the application merely. That is the rule now acted on by all the Judges in cases of amendments.

Vaughan Serjt. refused to give up possession, and the amendment was made.

Verdict for the plaintiff.

Taddy Serjt. and *Moody* for the plaintiff.
Vaughan Serjt. for the defendant.

CASES

ARGUED AND DECIDED

AT NISI PRIUS

IN K. B.

AT THE SITTINGS AFTER

EASTER TERM,

7 GEO. IV. 1826.

SITTINGS AFTER TERM AT WESTMINSTER.

DOMAN v. DIBDEN.

WESTMINSTER,
May 11.

THIS was an action by the drawer against the acceptor of the following bill of exchange: —

“ London, 17th of May 1825.

“ Eight months after date pay me or my order the sum of 100*l.* for value received, *with lawful interest for the same.* “ J. H. Doman.”

If a bill, payable at a given time after date, be for a specified sum, “ with lawful interest for the same,” interest shall be computed from the date.

Comyn, for the plaintiff, applied to the Court to know from what time the interest was to be calculated, whether from the date of the bill, or from the period at which it became due.

1826.

DOMAN
v.
DIBDEN.

ABBOTT Ld. C. J. I think the plaintiff is entitled to interest from the date of the bill.

Verdict for the plaintiff. (a)

Comyn for the plaintiff.

The cause was undefended.

(a) See *Kennerly v. Nash*, 1 Stark. N. P. C. 452. *Hopper v. Richmond*, *ibid.* 507. Bayley on Bills, 279., 4th edition.

WESTMINSTER,
May 12.

ROSE v. BLAKEMORE.

The retrospective clause in 3 G. 4. c. 75. (marriage act) is not repealed by statute 4 G. 4. c. 76.

THIS was an action for criminal conversation with the plaintiff's wife.

It appeared that one of the parties at the time of the marriage was under age, and illegitimate; and there was nothing to show whether they were married by licence or by bans. The marriage took place before the passing of the marriage act 3 G. 4. c. 75., and the parties at the time of the passing of that act, were of full age, and living together as husband and wife.

Brougham, for the defendant, objected that there was no sufficient proof of the marriage. Before the passing of the act 3 G. 4. c. 75. such a marriage, if by licence, was invalid. That act contained a retrospective clause legalizing such marriages in certain cases, under which clause the marriage in question certainly was included; but

that act was repealed by the statute 4 G. 4. c. 76., and in the repealing act there was no retrospective clause. Under the new act, therefore, such a marriage, if illegal when contracted, was not legalized; and as it was not shewn that the marriage in question was by bans, it originally was, and still continued, illegal.

1826.
ROSE
v.
BLAKEMORE.

ABBOTT Ld. C. J. The statute 4 G. 4. c. 76. repeals the statute 3 G. 4. c. 75. except as to things done under its provisions, and except "so far as it repealed any former act, or any clause, matter, or thing therein contained." (a) The retrospective clause (b) in the act 3 G. 4. c. 75. did operate with respect to the particular marriages to which it applied, as a repeal of the clauses in the former marriage act, 26 G. 2. c. 33., which rendered them invalid; it therefore was not repealed by the subsequent statute, and the marriage is perfectly good, even if by licence; if by bans, it was so even before the passing of the act 3 G. 4. c. 75.

In the course of the cause a witness refused to answer a question, whether he had published a particular hand-bill, on the ground that he had been threatened with a prosecution for the publication; and ABBOTT Ld. C. J. held the excuse sufficient. *Brougham*, in addressing the jury for the defendant, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny

If a witness declines to answer a question, no inference of the truth of the fact inquired into may be drawn from that circumstance.

(a) s. 1.

(b) s. 2.

1826.
 ROSE
 v.
 BLAKEMORE.

it, would not injure him; on which ABBOTT Ld. C. J. interposed, and said that no such inference ought to be drawn; that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into. *Brougham* suggested that the witness could not be affected by the inference which he drew from his conduct; that the witness's statement that the circumstance had taken place would be evidence against him on another occasion, but not so any inference drawn by third persons; but ABBOTT Ld. C. J. adhering to the opinion he had expressed, *Brougham* did not further press the argument upon the jury.

Verdict for the plaintiff, damages 150*l*.

Scarlett, E. Lawes and Bingham for the plaintiff.
Brougham and Tindal for the defendant.

So also in the case of *The King v. Watson*, 2 Stark. N. P. C. 158., *Holroyd J.* is reported to have used these expressions: — "I have understood the rule to be, that if you propose a question to a witness, and he declines to answer it, his not answering *can have no effect with the jury.*" And see Lord *Eldon's* opinion, in *Lloyd v. Passingham*, 16 Ves. 64., to the same effect.

Notwithstanding the deference due to these high authorities, it may perhaps be doubted whether these *dicta* be not inconsistent with the general principles, on which the rules concerning the right of witnesses to refuse an answer to questions have been established; or whether, at least, they ought not to be confined to those cases where the objection to the question is, that it tends to subject the witness to infamy; where the objection is, that the answering the question may subject him to forfeiture, penalty, or punishment (which was the nature of the objection in the principal case; for the hand-bill was not produced, so that there was no evidence that the publication was discreditable to him, or that, if established, it would render

him liable to punishment, but only that there was an intention of founding criminal proceedings upon it), it seems open to contend, that there is no reason why comments should not be made on the fact of the witness's refusal to answer, with a view to satisfy the jury of the truth of the fact suggested in the question.

It would seem that the witness is sufficiently secured from penalties, punishment, or forfeiture, if he is not compelled to say any thing which would be evidence against him in proceedings instituted with those objects; and as neither the inferences of counsel, nor the opinion of the jury, could have that effect, it appears as unreasonable to prevent counsel from drawing the one, as it is impossible to prevent the jury from forming the other. The conclusion, indeed, is so obvious, that the only way of preventing the jury from forming it, is by declaring, consistently with the opinion said to have been expressed by Lord *Ellenborough* in *Rex v. Lewis*, 4 Esp. N.P.C. 225., and by Lord *Alvanley* in *Macbride v. Macbride*, *ibid.* 242., not merely that the question need not be answered, but that it ought not to be asked. It is, however, to be observed, that both these, were cases where the tendency of the question was to degrade the witness, not to subject him to penal consequences; and Lord *Alvanley* expressly confined his opinion to questions "which have a direct and immediate effect to disgrace or disparage the witness." With respect to such questions, there may be more reason to adopt the principle laid down by *Abbott* Ld. C. J. in the principal case, and by *Holroyd* J. in *Rex v. Watson*; as the ill opinion of the jury, and of the persons present in court, forms part of that disgrace and infamy from which the Court is to protect the witness. Yet even in these cases, the inference being so obvious, where the witness declines to answer, the only complete protection is to refuse to allow the question; and this course, though supported by the cases cited above, does not seem to be according to the general current of authority, and is certainly at variance with general and unopposed practice.

1826.

ROSE
v.

BLAKEMORE.



1826.

SITTINGS AFTER TERM IN LONDON.

GUILDHALL,
May 19.

BRYAN v. LEWIS.

If a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has contracted to deliver: he cannot maintain an action for damages for non-performance of the contract.

THIS was an action against a broker for negligence in the sale of a certain quantity of nutmegs.

In *February* 1823, the defendant sold the nutmegs to one *Dawson*, to be delivered on the 6th of *May* following.

The warrants for the nutmegs were tendered to the purchaser on the 6th of *May*, but he was unable to pay for them. It also appeared that *Dawson* was a minor, and a person of no property or expectations.

It was proved that the plaintiff was not the owner of the nutmegs at the time of making the contract, and that he had bought them on the following 9th of *March*.

A question was likewise made whether the defendant had been employed by the plaintiff to sell the nutmegs, or by a person of the name of *Sentence*.

ABBOTT Ld. C. J. I am clearly of opinion that this action cannot be maintained; I have always thought, and shall continue to think, until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor

has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract. Such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences.

1826.

BRYAN
v.
LEWIS.

Campbell, for the plaintiff, observed, that however beneficial such a law might be, it would at first introduce a most material change in the proceedings of the Royal Exchange.

ABBOTT Ld. C. J. The law is not new, and if it had been acted upon during the last twelve months, much of that distress which now presses upon the community would have been avoided. I am anxious my opinion should be known, that if wrong it may be corrected, and if right that it may be acted upon. However, to give the plaintiff an opportunity of having my opinion reviewed, I shall put it to the jury to say whether the defendant was employed by the plaintiff to sell the nutmegs.

The jury found that the defendant was not employed by the plaintiff to sell the nutmegs, upon which the plaintiff was nonsuited.

Nonsuit. (a)

Gurney and *Campbell* for the plaintiff.

Scarlett and *Comyn* for the defendant.

(a) Under the civil law it is not essential to the validity of the contract of sale, that the seller should at the time of

1826.

BRYAN

v.

LEWIS.

making the contract have the ownership of the thing sold: "Accedere oportet rem de quâ tradendâ contrahatur. Quales res sunt omnes quæ sunt in commercio; etiam spes veluti jactus retis; res futuræ et res alienæ." Heinecc. Elem. Jur. lib. iii. tit. xxiv. Pothier, in his essay on this contract, observes, "Le contrat de vente ne consiste pas dans la translation de la propriété de la chose vendue; il suffit pour qu'il soit valable que le vendeur se soit valablement obligé de faire avoir à l'acheteur la chose vendue, et l'obligation qu'il en a contractée ne laisse pas d'être valable, quoiqu'il ne soit pas en son pouvoir de la remplir par le refus que fait le propriétaire de la chose de consentir à la vente; il suffit que ce que le vendeur a promis ait été quelque chose de possible en soi quoiqu'il ne fût pas en son pouvoir." De Cont. de Vente, part i. sect. 2. See Blackstone's definition of sale, 2 Blac. Comm. 446., and the judgment of Lord Chancellor *Parker* in *Cuddie v. Rutter*, Vin. Abr. vol. v. p. 540. S. C. 1 Peere Williams, 570.

GUILDHALL,
May 22.

THORPE & UXOR v. BOOTH.

The statute of limitations is no bar to an action on a promissory note, payable "24 months after demand," if presented for payment within six years before the action commenced.

THIS was an action against the maker of a promissory note. The defendant pleaded the general issue and the statute of limitations. The note had been given to the plaintiff's wife before her marriage. The following is a copy of the note:—

"March 12. 1813.

"Twenty-four months after demand, I promise to pay my sister *Frances Booth* the sum of seven hundred pounds.
"*Joseph Booth.*"

The note was presented for payment on the 28th of *June 1823.*

Scarlett, for the defendant, contended that he was entitled to a verdict, as no evidence had been given by the plaintiff, to take the case out of the statute. In *Christie v. Fonsick*, Selw. N. P. 361. 6th edit., MANSFIELD C. J. is said to have held, that on notes payable on demand, the statute runs from the date of the note, and not from the time of the demand.

1826.
THORPE
v.
BOOTH.

Gurney and *H. I. Stephen*, for the plaintiff, contended that it was unnecessary to give any such evidence, as the cause of action did not accrue until twenty-four months after demand made; and no demand was made upon the defendant until June 1823. They cited *Holmes v. Kerrison*, 2 Taunt. 323., as an authority.

ABBOTT Ld. C. J. This is certainly a point of some doubt and difficulty; but I am of opinion, on the authority of *Holmes v. Kerrison*, that the statute of limitations will not in the present case be a bar to the plaintiff's right to recover on this promissory note. But that my opinion, if wrong, may be corrected, I shall give the defendant liberty to move to enter a nonsuit.

Verdict for the plaintiff. (a)

Gurney and *H. I. Stephen* for the plaintiff.
Scarlett and *Abraham* for the defendant.

In the following *Trinity* Term, *Scarlett* moved for a rule to shew cause why a nonsuit should not be entered, but the Court refused the rule.

(a) See the authorities collected, Manning's Dig. Index, 302.

CASES
ARGUED AND DECIDED
AT NISI PRIUS
IN C. P.

AT THE SITTINGS AFTER
EASTER TERM,
7 GEO. IV. 1826.

SITTINGS AFTER TERM AT WESTMINSTER.

WESTMINSTER, **MERLE** and Another, Assignees of **BROOKES**,
May 9. a Bankrupt, *v.* **MORE.**

In an action by the assignees of a bankrupt, the bankrupt may allow his attorney before the bankruptcy to give in evidence privileged communications, though offered as proof of the act of bankruptcy.

ASSUMPSIT.

The act of bankruptcy, relied on by the plaintiffs was an assignment by *Brookes*, by deed, of all his property, which it was contended was fraudulent. And in order to prove the circumstances under which the deed was executed, the attorney of *Brookes*, who prepared the deed, was called, and asked to a communication made to him by his client. On its being objected that the communications spoken to were privileged, and therefore inadmissible, *Wilde* Serjt. proposed that the

bankrupt, who was present, should waive his privilege, and allow the attorney to give the evidence.

1826.

MERLE

v.

MORE.

Vaughan Serjt. resisted this, and argued that this would, in effect, be making the bankrupt a witness to prove his own bankruptcy, for which purpose he was by settled rule of law incompetent.

BEST C. J. I think the privilege is the privilege of the client, and he may waive it. If the bankrupt is present, and consents to the witness giving the evidence, I shall receive it.

This was then done by the bankrupt, and the plaintiffs obtained a verdict. (a)

Wilde Serjt. and *F. Pollock* for the plaintiffs.

Vaughan and *Lawes* Serjts. for the defendant.

(a) The incompetency of the bankrupt to support the commission is said to be founded on the interest of the bankrupt in the verdict, and the consequent danger of falsehood. It is evident that this reason does not apply to the competency of the bankrupt to waive the privilege, as the credibility of the witness cannot depend on the person by whom his permission to speak is given. The position, that the client may waive his privilege, is laid down in the treatises on evidence, but no authority is given, and the case is certainly of very rare occurrence. The subject was much discussed in the proceedings before the House of Lords concerning the abuses in *Greenwich Hospital*, and in three instances on that occasion were the clients, after objection by their former counsel, allowed to waive their privilege, and the evidence was received. *Howell's State Trials*, vol. xxi. pp. 341. 358. 408. In the principal case, the evidence proposed might have been admitted as not within the privilege, the communication not having been made with a view to a cause then existing, or about to be commenced. *Williams v. Mundie*, *supra*, 34.

1826.

WESTMINSTER,
May 11.

MACDOUGAL v. YOUNG.

In an action for tithes under 37 H. 8. c. 12. (*London tithe act*) evidence that the statute and decree have been acted on in the different parishes in *London* is admissible to prove that the decree has been enrolled, no enrolment being found in the present records of the Court of Chancery.

THIS was an action by the impropriate rector of the parish of *St. Helens, Bishopsgate*, in the city of *London*, to recover the amount of certain payments due in lieu of tithes, under the 37 H. 8. c. 12.

The first count set out part of the statute, and the decree thereon, and averred the enrolment of the latter. There were other counts for tithes bargained and sold, and on a special agreement for a fixed yearly payment. Pleas, *nil debet* generally; secondly, that the said order, direction, or decree was never enrolled in the Court of Chancery.

After putting in the statute book, in which the decree is printed together with the statute, and proving search amongst the records of the Court of Chancery, and that no enrolment of the decree was there found,

Onslow Serjt., for the plaintiff, offered evidence of the usage in different parishes in *London*, to show that the statute and decree had been always acted on; and he relied on 1 Ventr. 257., *Knight v. Dauler*, Hardr. 323., and *Thurston v. Slatford*, 1 Salk. 284.

Wilde Serjt. The payment by other persons in other parishes can be no evidence of the right in this, any more than the payment of a quit rent in one manor could be evidence of the right in another.

BEST C. J. I do not receive the payment of tithes in one parish as evidence of the right in another; a custom in one parish cannot be proof of any custom in another; but when I find in the printed statutes a copy of this decree, and find that no enrolment now exists, I think the plaintiff is entitled to go into secondary evidence of its having been enrolled, otherwise parties would be prejudiced by the negligence of those who have the custody of the records. The best secondary evidence would certainly be that the decree has been acted on in the parishes affected by it. A copy of a recovery acted on has been held to be evidence of a lost recovery; and it cannot be supposed that persons would have submitted to this decree unless they knew themselves bound by it.

1823.
MACDOUGAL
v.
YOUNG.

Several incumbents and tithe owners were then called; but they proved no uniform usage, and the payments in the different parishes appeared by their evidence to have been made on no certain rule.

Verdict for the defendant on the first count, and on the issue of the enrolment, and for the plaintiff on the other counts.

Onslow Serjt. and Henderson for the plaintiff.
Wilde Serjt. and Patteson for the defendant.

1826.

SITTINGS AFTER TERM IN LONDON.

GUILDHALL,
May 23.

CLARKE v. KING.

In an action by the vendee, on an agreement for the purchase of a public-house, with mutual stipulations, and liquidated damages for non-performance: Held, both parties having made default under the agreement, that the plaintiff was entitled to recover his deposit.

ASSUMPSIT on a special agreement, whereby the defendant agreed to sell and assign to the plaintiff a certain public-house; with the usual money counts.

The agreement contained stipulations on both sides, and the parties bound themselves for the due performance in the sum of 100*l.* as liquidated damages. The plaintiff had paid a deposit of 40*l.*

On the day fixed for the completion of the purchase the parties met, and it was found that the defendant was unable "to make a good and proper assignment of the victualler's and other licences" necessary to carry on the business, which by the agreement he had engaged to do.

It appeared in evidence, that the plaintiff was not prepared to pay the purchase money on the day of the meeting, and it was thereupon contended, by *Vaughan* Serjt. for the defendant, that as the plaintiff sued on his agreement, that was the foundation of his action, and therefore, before he could recover any thing from the defendant, he must shew complete performance, or readiness to perform on his part; that the parties having agreed on the amount of the damages on breach of the agreement, the plaintiff was entitled to those damages or none.

BEST C. J. I am of opinion that as neither party has done all that was incumbent on him, the agreement is entirely vacated; the plaintiff cannot therefore recover the penalty, but I think he can his deposit, the consideration for it having entirely failed.

1826.
CLARKE
v.
KING.

Verdict for the plaintiff 40*l*.

Wilde Serjt. and *Patteson* for the plaintiff.
Vaughan Serjt. for the defendant.

1824

SUMMER ASSIZES, 5 Geo. IV.

WESTERN CIRCUIT.—DEVON.

Coram ABBOTT Ld. C.J.

EXETER,
August 9.

ROWE v. GRENDEL.(a)

In trover for copper ore raised under the plaintiff's land: Held, that the presumption that the right to the minerals accompanied the fee simple of the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil.

TROVER for 100 tons of copper.

The defendant was proved to have converted to his own use a certain quantity of copper which had been raised under *Lemellyn Moor*; and, to prove that this copper belonged to the plaintiff, it was shewn, that *Lemellyn Moor* was part of an estate of thirty-six acres, called *Nansmellyn*. The plaintiff became possessed of this estate in 1814, as the witness said, by purchase; but no deeds nor payment of purchase-money were shewn. From 1814 up to the present time he had occupied and farmed the estate; had cut down and planted trees, and had built and pulled down out-houses; and, in fact, had had undisputed enjoyment of the

(a) This case would have been reported in a former number but for the bill of exceptions tendered at the trial; as we cannot find that the bill of exceptions is likely to be proceeded on, we have inserted it here.

surface of the land. But at the time of his coming into possession there was a shaft for tin, and one for copper, which had recently been worked by certain persons called the *Palk Company*, who had raised tin from it. In 1820, the plaintiff sunk two shafts, and raised some copper, which the *East Crinnis Adventurers*, who were the real defendants in this case, seized and sold, and continued to seize all the plaintiff raised until 1821, when they took possession of the mine, and continued working it, and selling the copper, up to the time of the action.

1824.
 Rows
 v.
 GARNER.

Upon the plaintiff's counsel closing his case here, ABBOTT Ld. C. J. said that the plaintiff must be called; but on *Pell* Serjt. pressing that the case might go to the jury, in order that he might have the benefit of a bill of exceptions to the direction, His Lordship proceeded to sum up.

The question for you to consider in this case is, whether the ore raised under *Lemellyn Moor* belongs to the plaintiff; and this action is maintainable in two respects, either possession, which as against a wrong-doer is sufficient; or, if the plaintiff was not in possession, then in respect of his right or title. Now, in regard to the first question, it can hardly be contended that the plaintiff had ever any actual possession, the ore purchased by the defendant having been raised by persons adverse to him. If that be so, you are next to consider had he right or title. Speaking generally, the possession of lands is evidence that the possessor has the highest interest known to the law, and a fee-simple will be pre-

1824.

Rows

v.

GREENFEL.

sumed; and in various cases it will be presumed that the fee-simple of the land carries with it the right to the minerals; but that presumption is not universal, because in mining countries the right to the minerals and the fee-simple of the soil are frequently in different persons; the two things are frequently for many generations separate; and we know that in conveyances of lands the minerals are not uncommonly excepted. It is for a jury, therefore, to exercise their discretion on all the circumstances before them to ascertain this question. It appears that the plaintiff came into possession of this estate in 1814, and from that time has held it under circumstances from which you may certainly presume the fee-simple of the land to be in him; and then you are to say whether you will also presume a title in him to all the minerals under the surface. Now you find that shortly before the plaintiff came into possession, some other persons, not the owners of the soil, had sunk shafts, had worked the mines, and, amongst the ore, copper in small quantities had appeared. In 1820, the plaintiff sinks a shaft for copper, and raises a few tons. This the *East Crinnis Company* take away, and from time to time carry away what further he raises until 1821, when they take possession of the mine, and have continued working it ever since.

Now looking at the possession and enjoyment of the land, and at the want and absence of enjoyment of the minerals, both before and after the plaintiff became possessed of the land, it is for you

to say whether he has made out to your satisfaction that these minerals belonged to him.

Verdict for the defendant ; upon which a bill of exceptions was tendered.

1824.
Rowe
v.
GREENFEL.

Pell, Wilde, Serjts., C. F. Williams, Erskine and Carter for the plaintiff.

Adam, Selwyn, R. Bayly, Manning and Tucker for the defendant.

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CASES

ARGUED AND DECIDED

AT NISI PRIUS,

IN K. B.

AT THE SITTINGS IN AND AFTER

TRINITY TERM,

7 GEO. IV. 1826.

ADJOURNED SITTINGS IN LONDON.

REX *v.* ROWLAND and Others.

GUILDHALL,
July 3.

THIS was an indictment for a conspiracy. Before the case was opened, *Scarlett*, for the prosecution, applied to have two of the defendants acquitted, that he might call them as witnesses.

On the counsel for the other defendants observing, that he supposed he had no power of objecting, ABBOTT Ld. C. J. said, I think you have not; they must be acquitted now. (a)

In an indictment against several persons, the counsel for the prosecution has a right, before opening his case, to the acquittal of any defendant he intends to call as a witness.

(a) In trespass, if one, whom the plaintiff designed to make use of as a witness, be by mistake made a defendant, the Court

1826.
 {
 REX
 v.
 ROWLAND and
 OTHERS.

Verdict of guilty against all the other defendants, except the elder *Rowland*.

Scarlett and *Brodrick* for the prosecution.
Gurney for the defendants.

will, on motion, give leave to omit him, and have his name struck out of the record, even after issue joined; for the plaintiff can in no case examine a defendant, though nothing be proved against him. Bull, N. P. 285.

As to the right of a defendant, against whom nothing is proved, to be acquitted in order to give evidence for his co-defendants, see *Wright v. Paulin*, *supra*, 128.

GUILDHALL,
 July 4.

SANDERSON v. NESTOR.

The withdrawing a juror by consent of the parties is no bar to a future suit on the same cause of action.

INDORSEE against the acceptor of a bill of exchange.

An action had been brought in *Ireland* by the plaintiff against the defendant on the same bill, when, by the consent of the parties, a juror was withdrawn.

Scarlett contended, that this was an agreement between the parties to terminate the dispute, and was therefore a bar to the present action.

ABBOTT Ld. C. J. was of opinion that the action was not barred, and the plaintiff had a verdict for 900*l*.

The *Attorney-General*, *Gurney*, and *Abraham* for the plaintiff.

Scarlett and *Chitty* for the defendant.

1826.

GUILDHALL,
Oct. 14.

GLOVER v. THOMSON.

ASSUMPSIT by indorsee of a bill of exchange against the acceptor.

The bill was lost. The clerk of the plaintiff's attorney proved that he had lost a bill from which he had drawn the declaration in the cause, and that it was correctly set out in the count. He proved also, that before the loss of the bill it had been shewn to one *Reynolds*, and that the loss occurred after the cause was set down for trial. The record shewed that this was after the maturity of the bill as stated there. *Reynolds* being called, proved that the bill shewn him had an acceptance in the defendant's hand-writing. *Pugh*, another witness, proved that he had received from the drawer, who was also the indorser, a bill indorsed with his name, corresponding with the bill set out in the record, and had delivered it to the plaintiff; and that both these transactions were for value. The plaintiff's attorney then proved that he had received the bill on which the action was brought from the plaintiff, and handed it to his own clerk, directing him to draw a declaration from it, which he saw him do. The draft of the declaration was then put in, and read as evidence of the bill.

An action may be maintained on a lost bill of exchange, if the loss did not happen till after the bill became due :

If the payee of a bill of exchange delivers it, with his name indorsed on it, to another, no proof is required of the handwriting of the indorsement.

1826.

GLOVER

v.

THOMSON.

ABBOTT Ld. C. J. (the cause being undefended)
said that the proof was perfectly satisfactory.

Verdict for the plaintiff.

Platt for the plaintiff.

In *Hansard v. Robinson*, Sittings after Michaelmas Term, 1826, which was also an action by the indorsee against the acceptor of a bill lost after it became due, *Campbell* and *Patteson*, for the defendant, objected that the action could not be supported without production of the bill; that the only remedy was in equity; and they cited *Pierson v. Hutchinson*, 2 Campb. 211. *Davis v. Dodd*, 4 Taunt. 602. and *Poole v. Smith*, Holt, N. P. C. 144. For the plaintiff, *Gurney* and *Chitty* cited *Long v. Bailie*, 2 Campb. 214 n. *Williamson v. Clements*, 1 Taunt. 523. *Brown v. Messiter*, 3 M. & S. 281. the principal case, and *Dart v. Hinks*, King's Bench Sittings after Michaelmas Term, 1820, which he cited from one of the briefs in the cause, but it did not appear whether the point was argued.

Littledale J. expressed a strong opinion against the right of the plaintiff to recover, and directed a nonsuit, with liberty to the plaintiff to move to enter a verdict.

See also *Dangerfield v. Wilby*, 4 Esp. N. P. C. 159. *Mayor v. Johnson*, 3 Campb. 324. *Champion v. Terry*, 3 Br. & B. 295.

MYERS v. TAYLOR.

GUILDHALL,
Oct. 16.

A plea *puis darrein continuance* may be put in at *nisi prius* upon paper.

IN this case *Chitty*, for the defendant, put in a plea *puis darrein continuance* on paper.

Platt for the plaintiff objected that it should be on parchment; that it was a record of the court, and as such should be on parchment.

Chitty mentioned a case at Nisi Prius where the plea was received on paper, and it was said, that the officer would transcribe it on the Nisi Prius record.

1826.

MYERS
v.
TAYLOR.

Scarlett amicus curæ said it was unnecessary to put in the plea on parchment. The defendant comes at Nisi Prius, and says that a particular fact has happened since the last continuance: this used formerly to be done *ore tenus*, and the officer put it on record: the defendant's putting it on parchment is nothing.

ABBOTT Ld. C. J. was at first inclined to reject the plea, but afterwards he received it, observing that it was the duty of the associate to transcribe the plea on the Nisi Prius record.

No motion was afterwards made to set the plea aside, but the plaintiff replied to it.

Platt for the plaintiff.

Chitty for the defendant.

See *Fitch v. Toulmin*, 1 Stark. N. P. C. 62. *Lovell v. Eastaff*, 3 T. R. 554. *Prince v. Nicholson*, 5 Taunt. 333.

1826.

GUILDHALL,
Oct. 18.

ALEWYN and Another, v. PRYOR and Another.

In action by vendee, for non-delivery of goods: Held, that in an agreement "for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; and if they do not so arrive, (without default in vendor) the agreement is null.

THIS was an action for a breach of contract in not delivering certain quantities of *Galipoli* oil, in pursuance of the following contract.

" *London, 30th March, 1825.* Sold this day, by order of Messrs. *Pryor, Turner, and Co.* all the *Galipoli* oil on board the *Thomas*, Captain *Nichols*, above ninety tuns, say thirty to forty tuns (more or less) direct from *Galipoli*, on arrival in *Great Britain*, at 54*l.* per tun of 236 gallons, duty paid, usual allowance for dirt, grease, and water; to be delivered by sellers on a wharf in *Great Britain*, to be appointed by the buyers, with all convenient speed, but not to exceed the 30th day of *June* next, and taken at the king's landing scale, and to be paid for in fourteen days from landing in ready money, allowing seven months' discount. The above oil to be delivered to the buyers in bond, and the present duty of 15*l.* 13*s.* per tun of 252 gallons, and seven months' discount thereon, to be deducted. Signed, *Stephen Cleasby*, broker. N. B. The above-mentioned vessel to call off *Falmouth* for orders."

The ship did not arrive till the 4th or 5th of *July* 1825, and therefore the oil could not be delivered before the 30th of *June*: on the arrival of the vessel the oil was tendered, but the plaintiffs declined to accept it, and brought the present action.

Scarlett and F. Pollock objected that the arrival was a condition precedent to the sale, and that the sellers meant, not to warrant the arrival of the oil by the 30th of *June*, but that if the oil did not arrive sooner, the buyer would not be bound to accept it.

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ALEXWYN
v.
PAYOR.

ABBOTT Ld. C. J. expressed himself clearly of opinion that such was the construction of the contract in point of law, and directed a nonsuit.

Marryat and Campbell for the plaintiffs.
Scarlett and F. Pollock for the defendants.

See *Boyd v. Siffkin*, 2 Campb. 326. *Hawes v. Humble*, *ibid.* 327 n. *Idle v. Thornton*, 3 Campb. 274. *Shadforth v. Higgin*, *ibid.* 385. *Busk v. Spence*, 4 Campb. 329.

EAST INDIA COMPANY v. PRINCE and
Another, Assignees, &c.

GUILDHALL,
Oct. 18.

THIS was an issue out of Chancery, to try whether on the 1st of *July* 1822 the plaintiffs had any debt

A. without
authority in-
dorses a bill of
exchange to

A. & B. who receive the amount from the acceptor. *Seemle* that the acceptor, discovering the money to have been paid on a mistake of facts, may recover it either as money had and received by A. & B. to his use, or as money paid by him to A's. An acknowledgment, to take a case out of the statute of limitations, may be inferred from the conduct of the party, without any verbal promise or admission. Therefore, where the acceptor, under the circumstances above stated, being sued by the party to whom the bills really belonged, gave notice to A. & B. that, in the event of a verdict passing against him, he should be entitled to recover the sum previously paid on the bills from the parties to whom it was paid, and A. & B. in consequence advised particular proceedings in the defence, and continued during the whole course of the action to be consulted and advise upon it; this was held sufficient evidence to warrant the jury in finding an acknowledgment by A. of a debt due by him, so as to enable the acceptor to succeed in an action against him for money paid, or to prove under a commission of bankrupt against him, notwithstanding the statute of limitations.

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proveable against the separate estate of *James Card*, a bankrupt, under a commission issued against him on *November 10th, 1821*.

The debt, if any, arose in respect of several bills of exchange drawn in *India* upon the plaintiffs, in the year 1809, and accepted by them. They were all payable to *W. Hope*, Esq., a gentleman resident in *India*, and transmitted by him to the bankrupt *Card* in *London*. *Card* managed *Hope's* affairs in *England* under a power of attorney, (which is particularly set out in *Murray v. East India Company*, 5 B. & A. 204.,) and supposing that that power authorized him to indorse bills for *Hope*, he indorsed the bills in question, as per procuration of *Hope*, to Messrs. *Davies* and *Card*, a firm in which he was himself a partner. These indorsements were made after the death of *Hope*; but this circumstance was not known to the plaintiffs or to *Card* at the time when the bills became due; at which time the plaintiffs paid them to the bankers of Messrs. *Davies* and *Card*, and the money so paid was afterwards paid over to Messrs. *Davies* and *Card* themselves. The plaintiffs, at the time of their paying the bills, were fully cognizant of the terms of the power. The administrator of *Hope*, in 1816, (within six years after administration granted to him, but more than six years after the payment of the bills) sued the plaintiffs on the bills, and obtained judgment in his favour in *Michaelmas* Term, 1821, on the ground that the terms of the power of attorney did not authorize *Card* to indorse bills for *Hope*.

To take the debt out of the operation of the statute of limitations, the following evidence was given. Before the commencement of the action of *Murray v. East India Company*, certain proceedings had been instituted by the representatives of *Hope* against the *Company*, which after some time were discontinued, and that action was brought. On *April* 17th, 1812, very shortly after the commencement of those proceedings, Mr. *Smith*, the attorney for the *Company*, wrote the following letter to Mr. *Healing*, the attorney for Mr. *Murray*, the then plaintiff, in answer to a proposal that the action then contemplated should be tried in assumpsit, to which form of action the *Company* were then supposed not to be liable. (a)

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“SIR,—In answer to your letter of this day I beg to say that, as in the event of Mr. *Murray*’s recovering against the *East India Company* the money paid by them on the bills of exchange in question they will be entitled to recover the same back from the parties to whom it was paid, I cannot, on the part of the *Company*, consent to waive any objection to the form of the proceedings, without their previous concurrence.”

A copy of this letter was sent to Messrs. *Vizard* and *Hutchinson*, the attorneys for Messrs. *Davies* and *Card*, who, on *April* 20th, wrote to Mr. *Smith* as follows:—

(a) See *Murray v. East India Company*, 5 B. & A. 204.

1826.

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 Company
 v.
 Parnes and
 Another.

“SIR,—We are much obliged to you for the copy of Mr. *Healing*’s letter, and of your answer, upon which we have seen Messrs. *Davies* and *Card*, who instruct us to say, that under the peculiar circumstances of the demand, they cannot consent to waive any objection to the form of the proceedings proposed to be adopted.”

No other express intimation of any intention to hold *Davies* and *Card*, or either of them, liable, was given till after the judgment recovered against the Company in *Murray v. East India Company* in 1821. During the whole course of the original proceedings, and of the substituted action of *Murray v. East India Company*, *Davies* and *Card* were constantly consulted on the part of the *East India Company*, and received intimation of every step taken in the cause; they advised, and attended consultations on it till the dissolution of their partnership, about 1815; and subsequently to that time both *Card* and *Davies* were consulted, and acted in the same manner.

Marryat for the defendants. The issue is, whether there was any debt due from *Card* to the plaintiffs so as to charge *Card*’s separate estate proveable under the commission. He then proceeded to argue, 1st, That there was no debt due at all; the plaintiffs having acted with full knowledge of the circumstances, or, at least, with the same knowledge that *Card* had: for no one knew of *Hope*’s death. 2dly, That there was no debt due from *Card* individually; the proper action, if any, being an action of money had and received, against *Davies* and *Card*.

3dly, That the action against *Card*, if any could be maintained, would be an action for the tort committed by him in improperly indorsing the bills ; and, therefore, for unliquidated damages. 4thly, That at all events, there being a debt jointly due from *Davies* and *Card*, that the plaintiffs could not prove against the separate estate of one, except for the purpose of dissenting from his certificate : and, 5thly, That at all events it could not be proved, as not having accrued within six years of the act of bankruptcy ; for the statute is only prevented from operating where there is a promise to pay, or at least a direct acknowledgment of *liability*, not a mere admission that the debt is unpaid.

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The points arising on the nature of the debt, and its proveability under the commission, were reserved, by the concurrence of the parties, for the opinion of the Court ; and no notice therefore is taken of them here, except as far as they were necessarily involved in the remaining question as to the statute of limitations.

ABBOTT Ld. C. J. in summing up to the jury on that question, said, that for the purposes at least of that question, the words of the issue might be considered equivalent to these,—whether there were at the time in question a separate debt due from *Card* to the plaintiffs. The questions arising on the bankruptcy need not be discussed here ; but two questions necessarily arise ; first, whether, independently of the bankruptcy and statute, there were any and what debt due from *Card* to

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the plaintiffs ; because upon that question will depend the construction to be put on the evidence given to take the case out of the statute : and, secondly, whether, if there be such a debt, there is evidence to take it out of the operation of the statute.

Independently of the bankruptcy and statute of limitations, I am of opinion that there was a separate debt due from *Card* to the plaintiffs. The money being paid under a mistake of fact as well as of law, may be recovered on discovery of the mistake of fact, that is, of Mr. *Hope's* death. But then the defendants say, that the money was money had and received by *Davies* and *Card* to the use of the plaintiffs. But I think it is equally correctly described as money paid by the plaintiffs to the use of *Card*, he having taken upon himself to give a title to the bill, and having first put it into circulation.

Then as to the statute of limitations, it appears that the action by *Murray* was commenced more than six years after the payment of the bills ; that both *Davies* and *Card* were informed of the action, attended consultations, advised on the mode of proceeding, and were continually informed of the progress of the action ; but that no intimation was given to either of them till after judgment was obtained against the Company, of any intention to hold them or either of them liable, unless such an intimation be contained in the letter of the 17th of *April* 1812. If such an intimation were then given, the conduct of the party receiving it would have looked strongly like an acknowledgment.

He then stated that letter and the answer returned to it by Messrs. *Vizard* and *Hutchinson*, and then said, the whole question resolves itself into this: Are you of opinion that *Card* then consented to be considered as liable to pay to the East India Company? for if he then did, you must clearly infer from his continuing the same conduct afterwards, that he continued to contemplate the same liability. The present defence made for him is not merely that their claim is barred by the statute, but that, on several grounds taken, he was never liable to them, and this may be material for your consideration: the question for you is, whether at the time that he received this intimation, and continued acting in aid of the plaintiffs, he considered himself liable, and consented to be so considered.

The jury, which was special, found for the plaintiffs.

Tindal S. G., *Scarlett*, *Gurney*, *Bosanquet* Serjt., and *Carter* for the plaintiffs.

Marryat, *Campbell*, and *Evans* for the defendants.

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Another.

WEBBER v. VENN.

GUILDHALL,
Oct. 21, 1813.

ASSUMPSIT. Pleas, the general issue, and statute of limitations. There was also a notice of set-off.

A verdict was taken by consent; but *ABBOTT* Ld. C. J., after stating the pleas on the record, and observing that there was also a notice of set-off,

Notice of set-off can only be given where the general issue is pleaded, without any other plea.

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said that it ought to be generally known, that where any plea is on the record besides the general issue, the set-off cannot, by the terms of the statute, be taken advantage of, unless pleaded.

Scarlett and F. Pollock for the plaintiff.
Gurney and Holt for the defendant.

See *Coulson v. Jones*, 6 Esp. N.P.C. 50. Tidd's Practice, 697. 6th edition, 2 Chitty, Pl. 474. note (h), 3d edition, *contra*.

GUILDHALL,
 Oct. 27.

HAWSE and Another v. CROWE, Assignee of
 RAMSBOTTOM.

If a vendee under terms to pay for goods on delivery, obtains possession of them by giving a check, which is afterwards dishonoured, he gains no property in the goods, if at the time of giving the check he had no reasonable ground to expect that it would be paid.

TROVER for tallow.

The plaintiffs sold the tallow in question to *Ramsbottom* under an agreement, the principal stipulations of which were, that the goods should be delivered in *London*, that the plaintiffs should give fourteen days' notice of delivery, and that *Ramsbottom* should pay for them on delivery.

On the day of delivery, *Ramsbottom* came to the counting-house of the plaintiffs, asked for and received the delivery orders for the tallow, and gave a check for 1400*l.* drawn by himself on the cashier of the Bank of *England*, payable to the plaintiffs. It is the custom of the Bank of *England* never to permit overdrawn; and accordingly, *Ramsbottom*

having on that day only 2*l.* 16*s.* 6*d.* in their hands, the check was dishonoured. The plaintiffs immediately gave notice to the warehouseman in whose custody the tallows were, not to deliver; but the tallow had already been transferred to one *Forrester*. Subsequently, however, the transactions with *Forrester* were rescinded, and the warehouseman delivered the tallow to *Crowe*, as assignee of *Ramsbottom*, under a commission of bankrupt issued against *Ramsbottom* in the mean time.

ABBOTT Ld. C. J. The right of *Forrester* to the tallow was determined before this action was brought, and *Crowe* claims only as assignee of *Ramsbottom*. The question therefore is, whether *Ramsbottom*, when he obtained the delivery orders and gave the check, intended to obtain possession of the tallow on the terms of the contract, namely, “*payment on delivery*,” or not. If he had reasonable ground to expect that the check would be paid, the transaction was not fraudulent, and the property would pass to him: if he had not reasonable ground for so expecting, the transaction was fraudulent, and the plaintiffs are entitled to recover.

Verdict for the plaintiffs.

Gurney and Campbell for plaintiffs.

Scarlett and Barnewall for defendant.

See *Gladstone v. Hadwen*, 1 M. & S. 517. *Taylor v. Plumer*, 3 M. & S. 562. *Noble v. Adams*, 7 Taun. 59. *Earl of Bristol v. Wilsmore*, 1 B. & C. 514. *Kilby v. Wilson*, *supra*, 178.

1828.

 ADJOURNED SITTINGS AT WESTMINSTER.

WESTMINSTER, **TULLOCK v. DUNN and Another, Executors of**
 Nov. 2. **HANLEY.**

In an action against several executors, pleas general issue and statute of limitations: Held, that neither a mere acknowledgment of the debt by all the executors, nor an express promise by one of them, takes the case out of the statute: there must be an express promise by all.

THE declaration contained the usual money counts, stating promises both by the testator and by the executors. Pleas, general issue, statute of limitations, and a set-off.

The testator died more than six years before the action was brought, and both the executors had within six years acknowledged that the plaintiff's demand of £30^l. was due, and one of them expressly promised that it should be paid. The others had made no such promise, there being some doubt whether the payment would be sanctioned by the family.

Scarlett for the plaintiff contended, that inasmuch as the defendants had put no plea on the record denying assets, they must be taken to be in a condition to pay, and that the acknowledgment of the justice of the demand by both, and the express promise of one of them, were sufficient to take the case out of the statute.

ABBOTT Ld. C. J. I am of opinion that the plaintiff must be nonsuited; the only count on

which he can pretend to recover, is on the account stated and promise to pay by the executors; I think, as against an executor, an acknowledgement merely is not sufficient to take the case out of the statute; there must be an express promise. The promise by one only is not enough to entitle the plaintiff to recover; there ought to be a promise by both.

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ecutors of
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Nonsuit. (a)

Scarlett and *Lawes* for the plaintiff.
Marryat for the defendant.

(a) See the judgments of the learned judges in *Atkins v. Tredgold*, 2 B. & C. 23.

GEORGE v. PRITCHARD.

WESTMINSTER,
Nov.

ASSUMPSIT on a special agreement to sell and assign to the plaintiff a lease of a public-house, of which the defendant was possessed, and other premises, for the sum of 2850*l.*; with an averment that the defendant undertook to make out a good and perfect title to the lease. There were also the usual money counts.

The agreement, on which the action was brought, contained no stipulation for the defendant's title. A deposit of 100*l.* was paid under it, and the

In action by vendee against vendor of a lease, for the deposit: Held, that the vendor is not bound to produce his lessor's title without an express stipulation to that effect.

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v.
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defendant produced an abstract of his title to the premises, without any account of that of the landlord. The attorney for the plaintiff insisted on the title of the landlord being produced, and on refusal rescinded the contract, and brought this action for the deposit. The lease had sixty-four years to run.

ABBOTT Ld. C. J. I think this action is not maintainable. On looking to the agreement, I do not find a syllable to warrant the averment in the declaration, that the defendant undertook to make out a good title to the lease. Without such a stipulation, a party selling a lease is not bound to produce his landlord's title, a thing which in most cases would be utterly impossible. The cases the other way are only cases in equity (*a*), and although it might be true that a vendor, on a bill for a specific performance, could not compel a purchaser to take a lease, without showing the lessor's title, still I shall hold that, in a court of law, the purchaser cannot recover his deposit on account of such title not being produced, unless the vendor has expressly contracted to furnish his lessor's title. The plaintiff must be called.

Nonsuit.

Gurney and *F. Pollock* for the plaintiff.
Scarlett for the defendant.

(a) *Purvis v. Rayer*, 9 Price, 488. and the cases cited there.

CASES

ARGUED AND DECIDED

1826.

AT NISI PRIUS

IN C. P.

AT THE SITTINGS IN AND AFTER

TRINITY TERM,

7 GEO. IV. 1826.

ADJOURNED SITTINGS AT WESTMINSTER.

WEBBER v. NICHOLAS.

WESTMINSTER,
June 13.

CASE for a malicious arrest.

Wilde Serjt. for the plaintiff claimed the extra costs as part of the damages, and stated, that Lord *Ellenborough* had decided in *Sandback v. Thomas*, 1 Starkie, N.P.C. 306., subsequently to the case of *Sinclair v. Eldred*, 4 Taunton, 7., that such costs were recoverable.

In an action for a malicious arrest, the plaintiff cannot recover damages for the extra costs.

BEST C. J. I should myself have thought that my Lord *Ellenborough's* opinion was the

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correct one; but I must hold myself bound by the decision of this Court, against the authority of a single judge at Nisi Prius.

Verdict for the plaintiff. (a)

Vaughan and *Wilde* Serjts., and *Chitty*, for the plaintiff.

Spankie Serjt. and *Short* for the defendant.

(a) *Doe v. Davis*, 1 Esp. 358. *Purton v. Honnor*, 1 B. & P. 205.

WESTMINSTER,
 June 20.

GRAY v. HILL.

The plaintiff repaired certain leasehold premises held by the defendant under a covenant to repair, on a parol promise by the defendant to assign him his lease: Held, that the defendant, upon refusal to assign, was liable on an implied *assumpsit* to pay the plaintiff for such repairs.

ASSUMPSIT, on a special agreement, to assign to the plaintiff a lease of certain premises, of which the defendant was possessed, in consideration that the plaintiff would put the premises in good and sufficient repair, within the covenant of the defendant in the lease. Averment, that the plaintiff did put the premises in repair, and breach that the defendant refused to assign the lease. There was a count for work and labour, and the usual money counts.

It was proved, that the premises had been admitted by the defendant to be in extreme want of repair, and that the landlord had given the defendant notice of his intention to sue him on the covenant, unless the premises were put into sufficient

repair within a certain time. Upon this it was verbally agreed between the plaintiff and the defendant, that the plaintiff should repair the premises, and the defendant would assign his lease to him. The plaintiff expended a considerable sum of money on the premises, and put them in complete repair. Upon his demanding an assignment of the lease, the defendant refused.

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Vaughan Serjt. for the defendant, contended, that the agreement was void under the statute of frauds, and the plaintiff could therefore not recover damages for the breach of it; the plaintiff undertook the repairs under the promise of an assignment, which promise was not binding.

Wilde Serjt. The defendant has had the benefit of the plaintiff's labour, and money expended at his request, and though he is not legally liable to assign the lease, the law upon his refusal implies a promise to compensate the plaintiff. 2 Phillipps's Evidence, 67.

BEST C. J. The objection is a most dishonest one, but, if legal, must prevail. The 4th section of the statute is decisive against the plaintiff on the special count, but I think the plaintiff entitled to a verdict on the others. The plaintiff has expended this money for the benefit, and at the instance of, the defendant; the law will therefore imply a promise not touched by the statute, nor within the danger of perjury guarded against by it; the agreement is executed on the part of the plaintiff,

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and the defendant is legally liable to remunerate him for what he has done.

The cause was then referred.

Wilde Serjt. and *Chitty* for the plaintiff.

Vaughan Serjt. and *Justice* for the defendant.

WESTMINSTER,
June 21.

WAKLEY v. JOHNSON.

In an action for libel, general evidence that the plaintiff has been in the habit of libelling the defendant is inadmissible.

CASE for a libel.

The libel complained of, was published in a periodical work called the *Medico-Chirurgical Journal*, to which the defendant, a physician, was a contributor. The plaintiff was editor of another medical and surgical work, called the *Lancet*, and a witness for the plaintiff was asked in cross examination, whether he did not know that the plaintiff had frequently published in the *Lancet* matters reflecting on the character of the defendant.

The question was objected to by the counsel for the plaintiff, on the authority of *May v. Brown*, 3 B. & C. 113., and it was argued that such libels were the subject of cross actions, and the question involved the opinion of the witness on writings which ought, if admissible at all, to be submitted to the jury.

For the defendant, *Vaughan* and *Wilde* Serjts. contended, that in *May v. Brown* such evidence was received at Nisi Prius, and not decided against

in the arguments *in banco* ; that such evidence was received in mitigation in *Finnerty v. Tipper*, 2 Campb. 76. ; that if the libel complained of be in letters, other parts of the correspondence are admissible ; that here the parties were engaged in hostile discussions, and the effect on readers of the libel published by the defendant would be materially affected by the knowledge that they were so engaged.

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v.
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BEST C. J. The question is too extensive, and calls on the witness to give his opinion on any libels the plaintiff may at any time have published of the defendant in the *Lancet*. Such libels are the subject of cross actions, and the proper remedy of the defendant was to have appealed to the laws of his country, and not to have sought redress by libelling the plaintiff. The case of *May v. Brown*, though it decides that particular libels are inadmissible, does not in express terms determine the general question to be inadmissible, but I think the judgments of the learned judges in that case fairly warrant this conclusion. In cases of oral slander, slanderous words of the plaintiff, spoken at the same time, are admissible ; and so are letters in a correspondence relating to the same subject matters. The question here is not so limited, and cannot be put.

Denman C. S. and *Kelly* for the plaintiff.
Vaughan and *Wilde* Serjts. for the defendant.

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ADJOURNED SITTINGS IN LONDON.

GUILDHALL,
June 28.

CHINN v. MORRIS.

In trespass for false imprisonment against a private individual, evidence of reasonable suspicion of plaintiff's having been guilty of felony, is admissible on the general issue in reduction of damages.

TRESPASS, for an assault and false imprisonment. Plea, not guilty.

The defendant had given the plaintiff in charge to a constable for felony; the constable took the plaintiff to a police-office, where the magistrate dismissed the charge.

Spankie Serjt., for the defendant, admitted that he had not sufficient evidence to prove the felony, but proposed to show that the plaintiff had reasonable ground of suspicion.

Wilde Serjt. objected that such evidence was inadmissible in this form of action; it might be otherwise in *case* for a false charge and defamation.

BEST C. J. I think this evidence admissible in reduction of damages.

Verdict for the plaintiff, one farthing damages. (*a*)

Wilde Serjt. and *J. Wilde* for the plaintiff.

Spankie Serjt. for the defendant.

(*a*) Selwyn's Nisi Prius, 910, 911. Starkie on Evidence, Part IV. 823.

1828.

ATTWOOD and Others v. GRIFFIN and
Another.

GUILDHALL,
June 28.

ASSUMPSIT against the acceptors of a bill of exchange for 600*l.* stated in the declaration to have been drawn payable to one *Peter Groves* or his order, and accepted by the defendant so drawn, and indorsed by the said *Peter Groves* to the plaintiffs.

A *bonâ fide* holder of a bill of exchange, accepted payable to (*blank*) or order may insert his own name as payee, and indorse the same, and the bill may be declared on in that form.

It appeared in evidence, that the bill was drawn and accepted, payable to (*blank*) or order, without the name of any payee; that it was *bonâ fide* negotiated to *Peter Groves*, who inserted his own name, and indorsed it to the plaintiffs.

Spankie Serjt., for the defendants, contended, that the alteration made in a material part after the bill was accepted made it void; that the insertion of the name of a payee made the bill of a different character, the indorsement of such payee being necessary to its circulation; whereas a bill accepted in blank would be at most but payable to bearer; *Master v. Miller*, 4 T. R. 320. 5 T. R. 367.; and that, at all events, there was a variance between the bill set out and the one really accepted by the defendant.

For the plaintiff it was answered, that a person who accepted a bill in blank gave authority to any *bonâ fide* holder to insert his name as payee; that such an alteration merely pursued such authority, and did not alter the character of the bill, or

1826. the liabilities on it. *Cruchley v. Clarence*, 2 M.
 & S. 90.
 ATTWOOD and
 Others

vs.
 GRIFFIN and
 Another.

BEST C. J. I think the objection not valid. The only difficulty I have had is in the misdescription, but the case cited for the plaintiffs decides every point: it is true that there the bill was declared on both ways, but my Lord *Ellenborough's* judgment is express, that one who accepts a bill in this form undertakes to be answerable for it in the shape of a bill. That being so, he undertakes to be answerable for it in the form which a *bonâ fide* holder has a right to give it, and the description in the declaration is made out against him. No new stamp is necessary; the first stamp gives authority for the insertion.

Verdict for the plaintiffs.

Wilde Serjt. and *F. Pollock* for the plaintiffs.
Spankie Serjt. for the defendants.

GUILDHALL,
 Nov. 4.

PERRING and Others v. DUNSTON.

A joint and several promissory note, at a shorter date than six months, signed by more than six individuals, not appearing to be made by

THIS was an action on a joint and several promissory note. The note appeared to be signed by seven persons besides the defendant, and was for 1000*l.* payable at three months to plaintiffs or order.

persons in partnership for the purposes of banking, may be good and valid in law.

Adams Serjt., for the defendant, objected, that the note was void, being on the face of it an infringement of the privilege granted to the Bank of *England*, under 21 G. 3. c. 60. s. 12., and he cited *Broughton v. Manchester Waterworks*, 3 B. & A. 1. and he distinguished this case from *Wigan v. Fowler*, 1 Stark. N. P. C. 459. on the ground that in that case the note did not appear on the face of it to be made by more than six persons.

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BEST C. J. I agree with the opinion given by my Lord *Ellenborough* in *Wigan v. Fowler*, and I think that, taking all the Bank acts (a) together, the object of the legislature was to give protection against rival Banks only. It does not appear that this note has any relation to persons in partnership for the purposes of banking. The case of *Broughton v. Manchester Waterworks* goes upon the fact of the defendants being a corporation. I think the note valid.

Verdict, by consent, for the defendant's proportion. (b)

Taddy Serjt. and *Campbell* for the plaintiff.

Adams Serjt. for the defendant.

(a) 8 & 9 W. & M. c. 20. 6 Anne, c. 22. s. 9. 15 G. 2. c. 13. s. 5. 21 G. 3. c. 60. s. 12.

(b) The clause in the 15 G. 2. c. 13., which incapacitates corporations or partnerships of more than six persons from being acceptors of bills of exchange, or making promissory notes, draws no distinction between the two classes so incapacitated. It seems, therefore, that the case of *Wigan v. Fowler*,

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1 Stark. N. P.C.459., if recognized as an authority to show that partnerships of more than six persons may accept bills, or make notes, unless they are established for banking purposes, would equally prove that corporations, not established for banking purposes, may do so also, as far at least as any objection arising on the Bank acts is relied on to prevent them. In the case, however, of *Broughton v. Manchester Waterworks Company*, 3 B. & A. 1., the illegality of such acceptances by corporations was assumed by all the judges, and as they all concurred in distinguishing that case from *Wigan v. Fowler*, on the ground that in *Wigan v. Fowler* the irregularity did not appear on the face of the note, and on that ground *only*, it is clear that they considered the note there as really irregular under the Bank acts.

The reasons, therefore, given by *Best* C. J. in favour of the validity of the note in the principal case, seem opposed to the opinion of the judges in *Broughton v. Manchester Waterworks Company*. But, even if the authority of that case be adhered to, the decision in the principal case seems right, on the ground that the making of a promissory note by more than six persons, not appearing by the terms of the note, or in any way shown, to be connected together in any other transaction, is not a making of a note by persons "united or to be united in covenants or partnership exceeding the number of six persons," according to the words of the statute.

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SUMMER ASSIZES, 7 Geo. IV.

WESTERN CIRCUIT. — EXETER.

Coram LITTLEDALE J.

SNOOK v. SOUTHWOOD.

EXETER,
July 24.

THIS was an issue on a mandamus.

The plaintiff had obtained a special jury, but by some mistake the *distringas* was not sent into the country in time, and the jury were not properly summoned; seven however attended, and on the counsel for the plaintiff praying a *tales*, Wilde Serjt., for the defendant, objected, that the trial ought not to proceed, and contended, that by the 6 G. 4. c. 50. s. 30. the parties were bound to try by the jury struck and summoned according to the act; that the defendant had relied on the plaintiff taking care that the special jury should be properly summoned, or he would have himself obtained one; that allowing the trial to proceed would enable a party at all times to deprive the other side of the advantage of a special jury; and he stated that Burrough J., at the preceding circuit at Winchester, refused to try an information by the Attorney-General, because the *distringas* for the special jury had not been sent in time properly to summon the special jury.

Where the plaintiff had obtained a special jury, but had neglected duly to summon them: Held, on the defendant's objecting to proceeding in the cause, that on the appearance of some of the special jurors the plaintiff was entitled to pray a *tales*, and to proceed in the trial.

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For the other side it was argued, that the plaintiff only was prejudiced by his own negligence in not having a full special jury, the defendant not having applied for a special jury, which he ought to have done, if he sought to have the advantage of one; that the case relied on proceeded on the ground of its being a criminal case.

LITLEDALE J., after consulting with GASELEE J., said that the cause ought to proceed; that it was not uncommon for both parties to summon a special jury, in order to secure their attendance.

The cause was proceeded in, and a verdict taken for the plaintiff subject to a special case. (a)

Merewether, Bernard, and Coleridge for the plaintiff.

Wilde Serjt., C. F. Williams, and Manning for the defendant.

(a) *Holt v. Meddowcroft*, 4 M. & S. 467.

EXETER,
 July 25.

POMEROY v. BADDELEY.

When the witnesses in a cause are ordered out of Court, the attorney in the cause may remain, and be afterwards called as a witness.

THIS was an issue from the Vice-Chancellor, to try whether a commission of bankrupt against *Roger Pomeroy* the younger was good and valid in law.

Wilde Serjt., for the defendant, applied to the Court, that the witnesses intended to be called on

both sides should go out of Court. *Williams* insisted that the attorney for the defendant, whom it was intended to call for the defendant, should leave the Court, or he would not be received.

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v.
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On *Wilde* Serjt. stating that the attendance of the attorney was necessary to enable him to conduct the cause, LITLEDALÉ J. said that an attorney was not within the rule, and might remain, and still be admissible as a witness, his assistance being in most cases absolutely necessary to the proper conduct of a cause. (a)

Verdict for the defendant.

C. F. Williams, Selwyn, and Manning for the plaintiff.

Wilde Serjt., *Merewether*, and *Erskine* for the defendant.

(a) Cont. *Rez v. Webb*, coram *Best* J. 1819. Stark. Evidence, Part IV. 1733; where, however, it does not appear that application was made to allow the witness to remain.

1896,

EXETER,
July 27.

REX v. ELLIS.

An examination of a prisoner charged with a felony, taken without threat or promise, by questions put by the magistrate, is, notwithstanding, admissible in evidence.

THIS was an indictment for felony, which had been removed by *certiorari* into the Court of King's Bench, and was sent down for trial by writ of *Nisi Prius*.

The examination of the prisoner, taken before the committing magistrate, was offered in evidence.

It appeared that part of the examination was elicited by questions put by the magistrate, the prisoner having claimed the right of his attorney's attendance and assistance, which the magistrate had refused to permit. No threat or promise was used by the magistrate.

It was objected by *Wilde* Serjt., on the authority of *Rex v. Wilson*, 1 Holt, N. P. C. 597., that an examination so obtained was inadmissible against a prisoner.

LITLEDALE J. It is stated in *Starkie's Evidence*, Appendix, Part IV. 52., where the case quoted is also noticed, that Mr. *J. Holroyd* received an examination to which there was this objection; I think his decision the correct one, and that the evidence is upon principle admissible.

His Lordship then suggested, that as the prisoner had been refused professional assistance, the case should not be further pressed: this was assented to by the counsel for the prosecution, and the prisoner was acquitted.

C. F. Williams, Tyrrel, and Coleridge, for the prosecution.

Wilde Serjt. and Praed for the prisoner.

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v.

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WELLS.

Coram LITLEDALE J.

REX v. DOWLING and Another.

WELLS,
Aug. 8.

INDICTMENT for highway robbery, laying the offence in the parish of *St. Thomas, Pensford*, in the county of *Somerset*.

In an indictment for felony, it is not necessary to prove affirmatively, for the prosecution, that such a parish as that laid in the indictment exists in the county.

Bompas, objected that there was no proof for the prosecution, that there was any such parish in the county, all the witnesses swearing to the parish of *Pensford*, and not *St. Thomas, Pensford*.

LITLEDALE J. The objection is not valid: I once reserved a case from the *Oxford* circuit on this ground; a great majority of the Judges held, that it was not necessary to prove affirmatively in the case for the prosecution, that such a parish as that laid in the indictment exists within the county; and they expressed a doubt how they should hold,

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even where it was proved negatively for the prisoner that there was no such parish.

Prisoners acquitted.

Bompas for the prisoners.

WELLS.

Coram GASELER J.

WELLS,
 Aug. 11.

BUSHEL and Others, Assignees of W. MILLS,
 a Bankrupt, v. BARRETT.

A judgment for conspiracy, to bribe a person (summoned as a witness on an information against the revenue laws,) not to appear before the justices of the peace, renders the person convicted incompetent as a witness.

TROVER.

For the plaintiffs, the bankrupt, who had received his certificate and released his assignees, was called as a witness. He was objected to as incompetent by reason of infamy. To support the objection, an examined copy of a judgment of the Court of King's Bench, against the said *W. Mills* and *Samuel Pain*, on an information by the *Attorney General*, was put in. The information charged, that a certain information was laid before two justices of the peace against the said *W. Mills*, for harbouring and concealing smuggled spirits, whereby a forfeiture of 100*l.* had accrued to the informer; that one *J. Hunt* was summoned to appear as a witness before the said justices, on the hearing of the said information; and that the said *W. Mills* and *Samuel Pain*, wickedly and malici-

ously intending to obstruct, &c. the due course of law and justice, did wickedly, and maliciously, and unlawfully conspire, &c. to persuade and hinder the said *Hunt* from appearing as a witness; and in pursuance of such conspiracy did promise the said *Hunt* a certain sum of money, to induce him to absent himself, &c., and the said *Hunt* did in consequence of such unlawful persuasion absent himself, &c.; of which offence the said *W. Mills* and *Samuel Pain* were convicted, and the said *W. Mills* was adjudged to pay a fine of 200*l*.

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In support of this objection, it was contended that the witness stood convicted of an offence, the tendency of which was to introduce falsehood into the course of justice, and to obstruct the due administration thereof; and *Clancey's* case, *Fortescue*, 208., was relied on as directly in point.

For the plaintiff it was argued, that in *Clancey's* case the witness had received an infamous judgment, and that in that case the judicial proceeding, from which the witness had been bribed to absent himself, affected life.

GASELEE J., after consulting with LITLEDALE J., said, I entertain no doubt on the subject; the essence of the offence of which the witness is convicted is the attempt to pervert the course of justice, and that by corrupting a witness. The magnitude of the judicial proceeding which it is attempted to obstruct is immaterial; the attempt to pervert is the same, whether it be on a charge for high treason or a misdemeanour: nor is it

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necessary that the crime be visited with an infamous judgment. This is directly within the principle of *Clancey's* case, and the witness must be rejected.

Taunton and *C. F. Williams* for the plaintiffs.
Wilde Serjt. and *Jeremy* for the defendant.

BRISTOL.

Coram LITLEDALÉ J.

BRISTOL,
 Aug. 18.

M'KENZIE v. HANCOCK.

In assumpsit for the breach of warranty of soundness of a horse, the defendant having refused to take back the horse, the plaintiff is entitled to recover for the keep, for such time only as would be required to re-sell the horse to the best advantage.

THIS was an action of assumpsit on the warranty of a horse. The declaration contained the usual allegation, that "the plaintiff had been put to great charges and expence in and about the feeding, keeping, and taking care of the horse."

It was proved on the part of the plaintiff, that he had offered to return the horse to the defendant on discovering its unsoundness, but that the defendant refused to receive him. The plaintiff also gave evidence of the expences of keeping him till the commencement of the action.

LITLEDALÉ J., in his directions to the jury, said, that with respect to the expences of keeping the horse, though a contrary doctrine very generally prevailed, he was of opinion that the plaintiff was

entitled to recover these expences for such a period only as, under all the circumstances of the case, the jury might fairly consider a reasonable time for the purpose of re-selling the horse ; that the practice of recovering damages for the keep of the horse in actions of this sort was entirely of modern date. According to the old doctrine, it was the duty of the purchaser, upon refusal of the seller to rescind the contract by taking back the horse, to sell him immediately ; and for this reason, declarations in actions upon warranties, in the old entries, contain no statement of such damages. He thought, however, that the plaintiff was entitled to recover these expences for so long a time as might reasonably be occupied in endeavouring to sell the horse to the best advantage.

Verdict for the plaintiff.

C. F. Williams and Carter for the plaintiff.

Wilde Serjt. and Gunning for the defendant.

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ABANDONMENT.

When a vessel has been driven on shore, and so damaged as to be unfit to proceed on her voyage without incurring an expence in repairs equal to her value: Held, that the insured may recover for a total loss, although no notice of abandonment had been given to the underwriters. *Cambridge v. Anderson*, Page 60

ACTION.

See ANCIENT LIGHTS. ASSUMPSIT. BILLS OF EXCHANGE, 10. BUBBLE. CONSEQUENTIAL DAMAGE. HUSBAND AND WIFE, 1. PRACTICE, 20. SALE, 2. SHERIFF.

1. A foreign consul, resident in England, and receiving a salary from his own government, cannot maintain an action for the trouble and labour he has been put to, in transacting business for merchants here, in which he acted as the officer of

his own government, and in conformity to their express instructions. *De Lema v. Haldimand*, Page 45

2. The withdrawing a juror by consent of the parties is no bar to a future suit on the same cause of action. *Sanderson v. Nestor*, 402

ADMISSIONS.

See BILLS OF EXCHANGE, 4.

Held, that a qualified acknowledgment of a sum due to the plaintiff would not entitle him to recover upon a count on an account stated. *Evans v. Verity*, 239

ADVERSE WITNESS.

On the trial of an issue from the Court of Chancery, with power to the plaintiff to examine the defendant as a witness: Held, that as a matter of right, plaintiff's counsel might cross-examine the defendant, although called as his witness; the

defendant standing in a situation necessarily adverse. *Clarke v. Saffery*, Page 126

AFFIDAVIT.

1. A party may be indicted for perjury in an affidavit, which cannot, from certain omissions in the jurat, be received in the court for which it is sworn, the perjury being held complete at the time of swearing. *Rex v. Hailey*, 94
2. In an indictment for perjury, in an answer to a bill in Chancery: Held, that the recital in the jurat of the place where the answer purports to be sworn, is sufficient proof that the oath was administered at the place named. *Rex v. Spencer*, 97

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT 1, 2. EVIDENCE, 2, 3. LANDLORD AND TENANT, 3. PRIMA-FIDE SALE, 3.

The defendant, by a written agreement, expressed to be made by himself on behalf of *A. B.* of the one part, and the plaintiff of the other part, stipulated to execute a lease of certain premises to the plaintiff. These premises were proved to belong to *A. B.*: Held, that the defendant was personally liable. *Norton v. Herron*, 229

AMENDMENT.

See COSTS.

ANCIENT LIGHTS.

Where the owner of a house divided it into two tenements, and let one of them: Held, that the lessee was liable to an action on the case for obstructing windows existing in the landlord's house at the time of the

demise, though of recent construction, and though no stipulation was made against the obstruction. *Riviere v. Bower*, Page 24

APOTHECARY.

See EVIDENCE, 23.

1. In an action by payee of a promissory note, expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker:" Held, that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary; and if that was proved, that the plaintiff could not recover without bringing himself within 55 G. 3. c. 194. s. 21. *Blogg v. Pinkers*, 125
2. The statute of 6 G 4. c. 133. s. 7., enacting that the common seal of the Society of Apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate to which such seal is affixed, does not make such certificate evidence, without proof that the seal affixed is the genuine seal of the Society. *Chadwick v. Bunning*, 306
3. A general certificate of qualification to practise, without limitation as to time or place, is sufficient under the 55 G. 3. c. 194. to enable an apothecary to sue on a bill for medicines, &c. furnished to patients in London, though on the back of such certificate is indorsed a receipt for four guineas, proved to have been paid after the commencement of the action; which sum the 19th section directs to be paid, and the receipt endorsed, where persons, originally qualified by their certificate to practise in the country, obtain the privilege of practising in London. *Id.* 307

ARBITRATION.

1. Award held good though made by an umpire, the arbitrators having no authority to appoint one, and though he examined the parties separately, they having attended him, and made no objection. *Matson v. Trower*, Page 17
2. Award held sufficient, though in the form of an opinion. *Ibid.*

ARREST.

See MALICIOUS ARREST. PRACTICE, 20.

1. A sheriff's officer having a writ against *A. B.*, tells him that he has a writ against him, upon which *A. B.* says, "Very well, I will come to you immediately," and shortly afterwards makes his escape, without having been touched by the officer: Held, that this was no arrest. *Russen v. Lucas*, 26
2. A constable directed by the defendant to take the plaintiff on a charge of felony, told the latter, "You must go with me," upon which the plaintiff, without further compulsion, attended the constable: Held, that this was a sufficient imprisonment to support an action, and that the plaintiff failing in proving the imprisonment as laid, might recover on the count for a common assault. *Pocock v. Moore*, 321

ASPORTATION.

Two prisoners indicted for horse-stealing in county *A.*, were found in joint possession of two horses in that county, which they had jointly taken at different times and places in county *B.*: Held, that evidence could be given of one only of the takings in county *B.*, each tak-

ing being a separate felony, and that the prosecutor's counsel must elect on which to proceed. *Rex v. Smith*, Page 295

ASSAULT AND BATTERY.

See PLEADING, 2. PRACTICE, 17.

ASSAULT AND FALSE IMPRISONMENT.

1. In an action against a magistrate for false imprisonment: Held, that a conviction filed at the quarter sessions was no justification of the defendant, where it appeared to have been framed upon a different statute from that of the commitment. *Rogers v. Jones*, 129
2. A constable directed by the defendant to take the plaintiff on a charge of felony, told the latter, "You must go with me," upon which the plaintiff, without further compulsion, attended the constable: Held, that this was a sufficient imprisonment to support an action, and that the plaintiff failing in proving the imprisonment as laid, might recover on the count for a common assault. *Pocock v. Moore*, 321
3. In trespass for false imprisonment against a private individual, evidence of reasonable suspicion of plaintiff's having been guilty of felony, is admissible on the general issue in reduction of damages. *Chinn v. Morris*, 424

ASSIGNEE.

See BANKRUPT, 5.

ASSUMPSIT.

1. *A.* without authority indorses a bill of exchange to *A. & B.* who

- receive the amount from the acceptor. *Seem* that the acceptor, discovering the money to have been paid on a mistake of facts, may recover it either as money had and received by A. & B. to his use, or as money paid by him to A's. *East India Company v. Prince*, Page 407
2. The plaintiff repaired certain leasehold premises held by the defendant under a covenant to repair, on a parol promise by the defendant to assign him his lease: Held, that the defendant upon refusal to assign, was liable, on an implied *assumpsit*, to pay the plaintiff for such repairs. *Gray v. Hill*, 420

ATTORNEY.

See ATTORNEY'S BILL, 1, 2, 3. BAILER. EVIDENCE, 35. PRACTICE, 5. 20. 27. PRIVILEGED COMMUNICATIONS, 3.

1. The privilege of not being examined to such points as have been communicated to an attorney while engaged in his professional capacity, extends only to those communications which relate to a cause or suit, existing at the time of the communication, or then about to be commenced. *Williams v. Mundie*, 34
2. The conduct of a cause by an attorney, in the name of A. B., does not make A. B. liable in trespass for acts done under a *fi. fa.* in such cause without some evidence of a retainer. *Crook v. Wright*, 278
3. It is a good defence to an action on an attorney's bill, that the costs sought to be recovered were incurred through inadvertence and want of proper caution on the part of the attorney. *Montrieu v. Jefferys*, 317

ATTORNEY'S BILL.

See ATTORNEY, 3.

1. In an action on an attorney's bill: Held, that searching at the judgment office to ascertain whether satisfaction had been entered on the roll in an action between A. and B.; and also whether issue had been entered in such action; also whether issue had been docketed in such action, were not taxable items within the 2 G. 2. c. 23. s. 23. *Fenton v. Correa*, Page 262
2. In an action on an attorney's bill: Held, although the plaintiff could not recover a particular item, because "the fees, charges, and disbursements," included in it were not specified pursuant to the statute 2 G. 2. c. 23., that he might nevertheless recover the residue of the bill, as to which the provisions of the statute had been complied with. *Drew v. Clifford*, 280
3. "Attending A. and B., the proposed bail of the defendant, and examining them as to their competency to justify;" — "attending the plaintiff in several actions commenced against the defendant, and arranging with him to take cognovits therein;" are taxable items in an attorney's bill within the 2 G. 2. c. 23. s. 23. *Watt v. Collins*, 284

AUCTION.

See TITLE, 2. VENDOR AND PURCHASER, 2.

A lessee of lands subject to a covenant against certain obnoxious trades, with a proviso for re-entry, grants under-leases of houses erected on the land, not containing a similar covenant and proviso: Held, that a purchaser by auction

of houses on the same land, and of the improved ground rents of the houses so under-let, might recover back his deposit money, this omission in the under-leases not having been mentioned in the conditions of sale. *Waring v. Hoggart*, Page 39

AWARD.

See **ARBITRATION**.

BAIL BOND.

See **VARIANCE**, 1.

BAILEE.

If an attorney pays into his bankers money of his clients, *mixing it with his own*, and the bankers fail, the attorney is liable to make good the loss. *Robinson v. Ward*, 274

BAILIFF.

See **PRACTICE**, 20.

BANK ACTS.

See **BILLS OF EXCHANGE**, 12.

BANKER.

See **LIEN**, 2. **ORDER**.

1. Payment by bankers to one of several trustees, of the proceeds of stock sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless previously authorized by them. *Stone v. Marsh*, 364
2. Where bankers, employed to receive dividends in the funds, had in their own books credited their em-

ployers with the dividends as received, and had allowed them to draw without having any other funds in their hands: Held, that the bankers were bound by the entries so acted on, though not communicated, and that they could not set up as a defence, that the entries had been fraudulently made by one of the partners, the money never having been received by the house. *Hume v. Bolland*, Page 371

BANKRUPT.

See **DECLARATIONS**, 3. **PAROL EVIDENCE**, 3.

1. A commission issued at the instance and request of the bankrupt is good at law. *Shaw v. Williams*, 19
2. A person carrying on business at *Warwick* came occasionally to *London* to make purchases for his trade, and while in *London* was frequently at the counting-house of *C.*, with whom he dealt, and where other persons were in the habit of calling upon him: Held, that desiring *C.* to deny him to a creditor, whom he expected to call, and concealing himself in *C.*'s house when the creditor called, was an act of bankruptcy. *Curteis v. Willes*, 58
3. A trader having goods lying in wharf, deposits blank delivery notes with a creditor to cover advances made, and becomes insolvent. The creditor, upon notice of the insolvency, fills up the blanks with his own name, and takes possession of the goods on the day before the trader commits an act of bankruptcy. In trover by the assignees against the creditor: Held, that the goods so taken possession of were not within the 21 *J.* 1. c. 19. s. 11. Held, also, that goods lying in the bankrupt's name on any part of the day of the bank-

ruptcy were within the statute. Held, also, that goods of the bankrupt lying in wharf in the names of his agents, and for which he had given delivery orders in his own name, were not within the statute, there being no reputed ownership. *Arbouin v. Williams*, Page 72

4. Where the sheriff, having paid over the proceeds of goods taken under a *f. fa.* against *J. A.*, was sued in trover by the assignees of *J. A.* under a commission of bankrupt, and gave notice to the creditor to defend the action, and upon his refusal let judgment go by default, and paid over the value of the goods to the assignees: Held, that the sheriff was not bound to defend the action, but might recover against the creditor the money paid him, upon proving the validity of the bankruptcy. *Austen v. Ward*, 116
5. The assignee of a bankrupt, lessee of certain premises, chosen on 15th November, 1823, kept the bankrupt in the premises, carrying on the business for the benefit of the creditors until April following, and himself occasionally superintended, but on the 22d December, 1823, disclaimed the lease by letter to the landlord: Held, that the assignee, notwithstanding such disclaimer, had elected to accept the lease by using the premises for the benefit of the creditors. *Clark v. Hume*, 207
6. Payment by weekly instalments in discharge of a debt for goods sold to the bankrupt is not a payment "in the usual and ordinary course of trade and dealing," so as to be protected by the 19 G. 2. c. 32. s. 1. *Bolton v. Jager*, 265

BARON AND FEME.

See HUSBAND AND WIFE.

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See SHIP, 2.

BENEFICIAL OCCUPATION.

See LANDLORD AND TENANT, 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See EVIDENCE, 18. 36. 46. INSOLVENT DEBTORS. LACHES, 2. LIEN, 2. LIMITATIONS, STATUTE OF, 1, 2. NOTICE OF DISHONOUR, 1. 4. PRACTICE, 3. 8. USURY, 2.

1. A bill having been dated by mistake 1822, instead of 1823, the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without their knowledge or consent, corrected the mistake: Held, that such alteration did not vacate the bill. *Brutt v. Picard*, Page 37
2. The plaintiffs, bankers, discounted for the defendants, bill-brokers, a bill of exchange which the latter did not indorse. The signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged: Held, that the defendants were liable to refund the money, and that the fact of their having paid over the amount to the indorsee, for whom they were brokers, would not relieve them from their liability. *Fuller v. Smith*, 49
3. In an action by payee of promissory note, expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker:" Held, that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary; and if that was

- proved, that the plaintiff could not recover without bringing himself within 55 G. 3. c. 194. s. 21. *Blogg v. Pinkers*, Page 125
4. The plaintiff in assumpsit gave in evidence an admission of the defendant, that he owed 147*l.* on a bill of exchange which had been returned dishonoured: Held, that such acknowledgment was admissible, though no notice to produce the bill had been given: Held, also, that interest was not recoverable unless the bill was produced. *Fryer v. Brown*, 145
5. Where two indorsements of the same party appeared on a bill of exchange, with an intermediate one of another person: Held, that the first indorsement must be presumed to have been made before the bill became due, *ib.*
6. A letter directed "Mr. *Haynes, Bristol*," containing notice of the dishonour of a bill, was proved to have been put into the post-office: Held, that this was not sufficient proof of notice, the direction being too general to raise a presumption that the letter reached the particular individual intended. *Walter v. Haynes*, 149
7. In an action against the drawer of a bill of exchange, dated "*Manchester*:" Held, that it was sufficient evidence of *his* having had notice of its dishonour, to prove that a letter, containing such notice, had been put into the post-office in *London*, directed to him "*Manchester*." *Mann v. Moors*, 249
8. The drawer of a bill of exchange accepted generally (after the 1 & 2 G. 4. c. 78.), added the words, "Payable at *Ransom and Co.*, bankers, *London*," without the knowledge of the acceptor, and then indorsed it for valuable consideration, the bill being overdue and the indorsee privy to the alteration: Held, that the acceptor was discharged. *Macintosh v. Haydon*, Page 362
9. If a bill, payable at a given time after date, be for a specified sum, "with lawful interest for the same," interest shall be computed from the date. *Domau v. Dibden*, 381
10. An action may be maintained on a lost bill of exchange, if the loss did not happen till after the bill became due. *Glover v. Thomson*, 403
- See *contra*, *Dart v. Hinks*, 404. n. and *Hansard v. Robinson*, 404. n.
11. A *bona fide* holder of a bill of exchange, accepted payable to (*blank*) or order may insert his own name as payee, and indorse the same, and the bill may be declared on in that form. *Attwood v. Griffin*, 425
12. A joint and several promissory note, at a shorter date than six months, signed by more than six individuals, not appearing to be made by persons in partnership for the purposes of banking, may be good and valid in law. *Perring v. Dunston*, 426

BOND.

See GUARANTEE. REPLEVIN BOND.

In debt on bond in the penalty of 120*l.* conditioned for the repayment of the same sum with lawful interest: Held, that interest was recoverable beyond the penalty, to the amount of the damages laid in the declaration. *Francis v. Wilson*, 105

BRIDGE.

A bridge used only on occasion of floods, and lying out of and alongside the road commonly used: Held,

a public bridge, and the county liable to repair. *Rex v. Inhabitants of Devon*, Page 144

BROKER.

See FRAUDS, STATUTE OF, 2.
TROVER, 2.

The plaintiffs purchased by the order of *T. and Co.*, of *Ryder*, to whom they were known as brokers, 110 bales of cotton. The contract was regularly entered in the plaintiff's books as a purchase and sale by brokers, and brokerage charged to both parties. Bought and sold notes were delivered, not disclosing the names of principals, but charging brokerage to both. *T. and Co.* and *Ryder* were not known to each other as concerned in the dealings. The plaintiffs paid *Ryder* for the cottons, and handed them over to *T. and Co.*, with a bill of parcels in their own names: Held, that the plaintiffs were principals in the purchase of *Ryder*, and sale to *T. and Co.* *Kilby v. Wilson*, 178

BUBBLE.

The defendant had been employed as the plaintiff's agent in raising a loan for establishing a colony on the coast of *Honduras*, and as such had received deposits from subscribers, and had given scrip certificates, on which it was stated that the loan was for the use of the *Poyais* state: Held, that it was incumbent on the plaintiff to prove the existence of such a state, on the ground that the parties to a mere bubble to deceive the public could not maintain an action against each other. *McGregor v. Lowe*, 57

CARRIER.

See EVIDENCE, 2, 3.

CERTIFICATE.

See APOTHECARY, 2.

CERTIORARI.

See PRACTICE, 19.

CHARACTER.

See EVIDENCE, 40.

CHECK.

See SALE, 4. SECONDARY EVIDENCE, 3.

COMMISSION.

See BANKRUPT, 1.

COMMITMENT.

See CONVICTION.

CONDITION PRECEDENT.

See SALE, 3.

CONFESSION.

See EVIDENCE, 49.

CONSEQUENTIAL DAMAGE.

The *London Dock Act*, 39 & 40 G. 3. c. 47. s. 151. enacts, that no action shall be commenced against any person, for any thing done in pursuance of that act, after six calendar months next after the fact committed. The *London Dock Company* had, two years before the commencement of this action, undermined the wall of a wharf; in one undivided third part of which the plaintiff's father then had a life-interest, with remainder to his son in fee. In consequence of this undermining the wall fell, but

after the plaintiff's title accrued : Held, that the son might maintain this action, although the wall was undermined during the lifetime of the father : Held, that the action having been brought within six months after the falling of the wall was sufficient. *Gillon v. Bodding-ton*,
Page 161

CONSIDERATION.

See IMMORAL AGREEMENT. LANDLORD AND TENANT, 4. SALE, 1.

CONSPIRACY.

See HUSBAND and WIFE, 4. WITNESS, 8.

CONSTRUCTION OF CONTRACT.

See EVIDENCE, 12. PRIMAGE. SALE, 2, 3.

1. Where goods were sold under a written contract at so much *per* load, "to be taken by the dock account, and paid for in cash, allowing 2½ *per cent.* discount, within fourteen days from the date; the goods to be taken on board, and the duty deducted;" and the duty was payable by the buyer : Held, that the discount was to be calculated on the sum to be received by the seller only, exclusive of the duty. *Smith v. Blandy*, 260
2. The construction of a mercantile contract is matter for the jury, *Ibid.*

CONVICTION.

In an action against a magistrate for false imprisonment : Held, that a conviction filed at the quarter sessions was no justification of the defendant, where it appeared to have been framed upon a different statute from that of the commit-

ment : Held also, that the 43 G. 3. c. 141. s. 2. only applied to cases where the conviction had been *quashed*, and that the guilt of the plaintiff could not be given in evidence in mitigation of damages, where the plaintiff only sought to recover the amount of a sum he had been fined, and which fine he had paid in order to be discharged from the commitment. *Rogers v. Jones*, Page 129

COPPER ORE.

See TITLE.

CORPORATION.

See FOREIGN CORPORATION.

COSTS.

See MALICIOUS ARREST.

The plaintiff in ejectment has a right to an amendment of the record, upon payment of the costs of the application, against a defendant who refuses to give up the possession. If the defendant consents to give up possession, the plaintiff must pay the whole costs, up to the time of the application. *Doe d. Lewis v. Coles*, 380

COUNSEL.

See PRACTICE, 13. 23. PRIVILEGED COMMUNICATIONS, 2.

COUNTERMAND.

See ORDER.

COVERTURE.

See MARRIAGE.

DAMAGES.

See ASSAULT AND FALSE IMPRISONMENT, 3. BOND, 1. CONVICTION. MALICIOUS ARREST. PLEADING, 1. POLICY OF INSURANCE, 1. WARRANTY, 3.

DECEIT.

See **VENDOR AND PURCHASER**, 1.
WITNESS, 4.

DECLARATIONS.

See **EVIDENCE**, 16, 18, 19, 37.

1. The contents of a written instrument cannot be proved against a party by his declarations, unless the non-production of it be accounted for. *Bloxam v. Elsie*,
Page 187
2. The declarations of a holder of a bill of exchange, made whilst the bill is current, are not admissible against a subsequent holder under an indorsement made before the bill became due. *Smith v. De Wruitz*, 212
3. The declarations of a bankrupt made before the bankruptcy are not admissible to prove the trading in an action by the assignees. *Bromley v. King*, 228

DEED.

See **EVIDENCE**, 29, 43.

- A. B.* being insolvent, conveyed by deed all his estate to trustees for the benefit of his creditors, with a proviso, that "if all and every of the creditors of the said *A. B.*, whose debts do amount to more than 5*l.*, shall refuse to execute or otherwise consent to this deed within six months from the date thereof, the said deed shall be void to all intents and purposes:" Held, that a lease vested in the trustees could not be defeated, under this proviso, without an express refusal of every creditor above 5*l.* to execute or consent. *Holmes v. Love*,
138

DEL CREDERE COMMISSION.

See **USURY**, 2.

DELIVERY ORDER.

See **FRAUDS, STATUTE OF**, 1.

DEMAND.

See **TENDER**.

DEMURRER.

See **PRACTICE**, 3.

DEPOSIT MONEY.

See **AUCTION. TITLE**, 2. **VENDOR AND PURCHASER**, 2.

DISCHARGING JURY.

See **JURY**, 1, 2.

DISCOUNT.

See **CONTRACT**, 1.

DISPENSATION OF COVENANT.

See **FORFEITURE**, 2.

DISTRESS.

See **LANDLORD AND TENANT**, 6.

DOG FIGHT.

See **WAGER**.

EJECTMENT.

See **COSTS. FORFEITURE**, 2.

1. The defendant, mortgagee of a term, purchased the mortgagor's whole interest in the premises, in consequence of the lessor's advice, "to take to the premises, and finish the buildings," given after a right of re-entry had accrued for the non-completion of the buildings:

- Held, that the lessor might maintain an ejectment for the forfeiture against the defendant, the buildings never having been completed, and a sufficient time having elapsed since the purchase for the completion. *Doe d. Sore v. Ekins*, Page 29
2. The incumbent of a living may sustain ejectment against parties in possession of the glebe lands, though the current year of a tenancy from year to year, created by his predecessor, is unexpired. *Doe d. Kerby v. Carter*, 287

ENROLMENT OF LEASE.

See EVIDENCE, 43.

ENTRIES.

See EVIDENCE, 10.

EVIDENCE.

See BILLS OF EXCHANGE, 7. CONTRACT, 2. CONVICTION. DECLARATIONS, 1—3. FRAUDS, STATUTE OF, 3. FRAUDULENT SALE. INTERROGATORIES. INDICTMENT, 2. PAROL EVIDENCE. POLICY OF INSURANCE, 1. SECONDARY EVIDENCE. SHIP, 1. VARIANCE. VENDOR AND PURCHASER, 1.

1. Where a verdict had been found subject to a special case, and a new trial had been directed: Held, that the special case, signed by the counsel on each side, was evidence of the facts there stated. *Van Wart v. Wolley*, 4
2. Held that the following memorandum, "Received of L. and Co. a paper parcel directed to Messrs. H.B. and Co., 62. Lombard-street, value 260*l.*, which we agree to deliver to them to-morrow, fire and robbery excepted, carriage paid here," given by a carrier, on the receipt of goods, was admissible in evidence, without a stamp, as being an agreement, the subject-matter of which did not exceed 20*l.* *Latham v. Rutley*, Page 13
3. A memorandum by a wharfinger of the receipt of goods to be shipped in a particular manner, may be given in evidence to show the terms on which they were received, without a stamp, although the value of the goods was above 20*l.*, the wharfage being of a less amount. *Chadwick v. Sills*, 15
4. A letter, which had been in the possession of the defendant, was filed in the Court of Chancery pursuant to an order of that court: Held, that secondary evidence of it was not admissible, it being in the power of either party upon application to that court to produce it. *Williams v. Munnings*, 18
5. In an action against one of several partners, the defendant cannot, by a release, make his partner a competent witness for him. *Simons v. Smith*, 29
6. In an action by executors, a paid legatee is a competent witness to increase the estate. *Clarke v. Gan-non*, 31
7. In an action against the sheriff for negligently executing a writ, an assistant of the sheriff's officer, who had been employed by the officer to execute the writ, is a competent witness for the sheriff, without a release from the officer. *Clark v. Lucas*, 32
8. A notice to produce letters written by the plaintiff to the defendant, who was a foreigner, and had been held to bail upon coming to this country seven months previous to the trial, was served on the 10th of April, the trial taking place on the 14th: Held, sufficient to let in secondary evidence of the contents,

- although the letters were written eighteen years back, and addressed to the defendant at his residence abroad. *Drabble v. Donner*, Page 47
9. The defendant had been employed as the plaintiff's agent in raising a loan for establishing a colony on the coast of *Honduras*, and as such had received deposits from subscribers, and had given scrip certificates, on which it was stated that the loan was for the use of the *Poyais* state: Held, that it was incumbent on the plaintiff to prove the existence of such a state, on the ground that the parties to a mere bubble to deceive the public could not maintain an action against each other. *McGregor v. Lowe*, 57
10. Entries in the land-tax collector's books, stating *A. B.* to be rated for a particular house, and his payment of the sum rated, are admissible evidence to show that *A. B.* was in the occupation of the premises at the time mentioned. *Doe d. Smith v. Cartwright*, 62
11. A copy of an official paper containing the number of passengers on board a vessel, made in pursuance of an act of parliament, by an officer of the customs, is admissible evidence to show the number and description of persons that were on board the vessel. *Richardson v. Mellish*, 66
12. In an action on a policy of insurance on a voyage "at or from the port or ports of discharge and loading in India, and the *East India Islands*," evidence admitted to prove that the *Mauritius* is considered in mercantile contracts as an *East India* island, although treated by geographers as an *African* island. *Robertson v. Money*, 75
13. A fine was levied of twelve messuages in *Chelsea*. It was proved that the cognizor had more than twelve messuages in *Chelsea*: Held, that parol evidence was admissible to show which messuages the cognizor intended to pass by the fine. *Doe d. Bulkeley v. Wilford*, Page 88
14. A witness who had never seen the defendant, but had corresponded with a person of the defendant's name, living at *Plymouth Dock*, where the defendant resided, and where, according to other evidence, there was no other person of that name, stated that the handwriting of certain letters was that of the person with whom he had corresponded: Held, that this evidence was sufficient to admit the letters to be read against the defendant. *Harrington v. Fry*, 90
15. In an indictment for perjury in an answer to a bill in Chancery: Held, that the recital in the *jurat* of the place where the answer purports to be sworn, is sufficient proof that the oath was administered at the place named. *Rex v. Spencer*, 97
16. The declarations of *prochein amy* made before action brought, are not admissible for the defendant. *Webb v. Smith*, 106
17. In an action by payee of a promissory note, expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker:" Held, that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary; and if that was proved, that the plaintiff could not recover without bringing himself within 55 G. 3. c. 194. s. 21. *Blogg v. Pinkers*, 125
18. The declarations of a former holder of a bill of exchange, made during his possession, are evidence against a subsequent indorsee. *Pocock v. Billings*, 127
— But see *infra*, 30.

19. In questions of pedigree, declarations tending to show the person making them entitled to a remainder upon failure of issue of the then possessor of an estate, held admissible for the plaintiff claiming under that person, if made *ante litem motam*. Hand-writing of an ancient paper may be proved by the opinion of a witness, first comparing it with other authentic old writings at the time of the trial. *Doe d. Tilman v. Tarver*, Page 141
20. The plaintiff in *assumpsit* gave in evidence an admission of the defendant, that he owed 147*l.* on a bill of exchange which had been returned dishonoured: Held, that such acknowledgment was admissible, though no notice to produce the bill had been given: Held, also, that interest was not recoverable unless the bill was produced. *Fryer v. Brown*, 145
21. A letter directed "Mr. Haynes, Bristol," containing notice of the dishonour of a bill, was proved to have been put into the post-office; Held, that this was not sufficient proof of notice, the direction being too general to raise a presumption that the letter reached the particular individual intended. *Walter v. Haynes*, 149
22. In order to show that defendant had caused and procured a printed libel to be inserted in a newspaper, a reporter to a public newspaper proved that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of one or two slight alterations, not affecting the sense: Held, that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant; but that the newspaper could not be read in evidence, without producing the written account delivered by the witness to the editor. *Adams v. Kelly*, Page 157
23. Averment in a declaration on the 55 G. 3. c. 194., that defendant practised as an apothecary "*without having obtained such certificate as by the said act is required:*" Held, that the *onus probandi* that the defendant had obtained his certificate lay with him and not with the plaintiffs. *The Apothecaries' Co. v. Beniley*, 159
24. An examined copy of an answer in Chancery, may be identified by a witness who has seen the hand-writing of the defendant to the original, although the original document is not produced at the time that he speaks to his belief of the defendant's signature to it. *Dartnall v. Howard*, 169
25. *Semble*, that a minute-book, in which entries of the proceedings at sessions are made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record, so as to be admissible in evidence as a proof of the fact there stated. *Rex v. Bellamy*, 171
26. In case for a nuisance, notice to remove the nuisance left at the premises is evidence against a subsequent occupier. *Salmon v. Bensley*, 189
27. Conveyance to the defendant's nominee supports an averment that "the defendant became the purchaser." *Seaman v. Price*, 195
28. Registered ownership is *prima facie* evidence of liability for the repairs of a ship; but may be rebutted by showing the credit not

- to have been given to the owners. *Cox v. Reid*, Page 199
29. A deed of defeasance, making void an absolute bill of sale, upon payment of a certain sum of money, is admissible for the defendants to show the purposes of their ownership; the bill of sale being duly entered on the registry, without mention of the defeasance. *Ib.*
30. The declarations of a holder of a bill of exchange, made whilst the bill is current, are not admissible against a subsequent holder under an indorsement made before the bill became due. *Smith v. De Wruitz*, 212
31. The institution of a party to a living, reciting the cession of his predecessor, followed by induction, is sufficient evidence to support an ejectment; though the predecessor is shewn to have been in possession, and no other evidence of his cession is given. *Doe d. Kerby v. Carter*, 237
32. Where by the cross-examination of the plaintiff's witness, who had proved a *prima facie* case for the sale of goods, it appeared that the plaintiff had said that the goods were sold under a written contract, which he produced to the witness: Held, that the written contract spoken of was evidence for the plaintiff, without calling the broker, by whom it purported to have been made and signed. *Smith v. Blandy*, 257
33. The assertion of a party, in a conversation given in evidence against him, of facts in his favour, is evidence for him of those facts, *ib.*
34. In an action against the sheriff for taking insufficient sureties in replevin, if the sheriff has assigned the replevin bond to the plaintiff, it is unnecessary to prove the execution of the sureties, though averred in the declaration. *Barnes v. Lucas*, Page 264
35. A retainer to commence a suit, which suit is afterwards abated by plea for non-joinder, is sufficient evidence of a retainer to commence another action against the parties named in the plea in abatement. *Crook v. Wright*, 278
36. In an action against the acceptor of a bill of exchange, where defendant's attorney had given notice to the plaintiff to produce all papers relating to a bill described as the bill in question, and said to be "*accepted by the defendant*:" Held, that such a notice was *prima facie* evidence of the defendant's acceptance. *Holt v. Squire*, 282
37. To prove a pedigree, the declarations of the husband of one of the family are admissible, though he was not otherwise related to the family. *Doe d. Northey v. Harvey*, 297
38. In an indictment for perjury committed on the trial of a cause, it is sufficient for the prosecutor to prove all the evidence given by the defendant, referable to the fact on which perjury is assigned. Proof of the evidence set out by a witness who speaks from memory, but will not swear that he has given the whole of the defendant's former testimony, but says that he has stated to the best of his recollection all that was material to the present enquiry and relating to the transaction in question, and is positive nothing was said qualifying the evidence proved, is sufficient to go to the jury. *Rex v. Rowley*, 299
39. Proof that the defendant was "sworn and examined as a witness," supports an averment that the defendant was sworn on the Holy Gospel, that being the ordinary mode of swearing, *Ib.* 302

40. In an action of slander for imputing felony, with a count for maliciously charging the plaintiff with theft before a justice, to which the defendant pleaded the general issue, and also pleas in justification of the slander, averring that the charge of felony was true: Held, that evidence of general good character was not admissible for the plaintiff. *Cornwall v. Richardson*, Page 305
41. The statute 6 G. 4. c. 133. s. 7. enacting that the common seal of of the Society of Apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate to which such seal is affixed, does not make such certificate evidence, without proof that the seal affixed is the genuine seal of the society. *Chadwick v. Bunning*, 306
42. *Quære*, Whether the non-arrival of a ship at her port of destination is evidence of her loss, where the crew have been heard of after the vessel sailed, and after she is said to have been lost. *Koster v. Innes*, 333
43. The enrolment of a lease under the 1 & 2 G. 4. c. 52. s. 8., which enacts that a deed so enrolled, "shall be as good and available in law, and of the like force and effect in all respects as if the same had been enrolled in any of His Majesty's courts of record at *Westminster*, or as if a memorial of any such deed had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and tenements in the counties in which the same are situate," is not admissible as evidence of the deed, without proof of the execution. *Jenkins v. Biddulph*, 339
44. *Semble*, that a letter demanding payment of a debt, sent by the plaintiff's attorney, and received by the defendant, is not sufficient evidence of a demand, on the issue of a prior demand and refusal to a plea of tender. *Edwards v. Yeates*, Page 360
45. In an action for tithes, under 37 H. 8. c. 12. (*London* tithe act,) evidence that the statute and decree have been acted on in the different parishes in *London* is admissible to prove that the decree has been enrolled, no enrolment being found in the present records of the Court of Chancery. *Macdougall v. Young*, 392
46. If the payee of a bill of exchange delivers it, with his name indorsed on it, to another, no proof is required of the handwriting of the indorsement. *Glover v. Thomson*, 403
47. In an action for libel, general evidence that the plaintiff has been in the habit of libelling the defendant is inadmissible. *Wakley v. Johnson*, 422
48. In trespass for false imprisonment against a private individual, evidence of reasonable suspicion of plaintiff's having been guilty of felony, is admissible on the general issue in reduction of damages. *Chinn v. Morris*, 424
49. An examination of a prisoner charged with a felony, taken without threat or promise, by questions put by the magistrate, is, notwithstanding, admissible in evidence. *Rex v. Ellis*, 432
- EXAMINATION.**
- See EVIDENCE, 49. PAROL EVIDENCE, 3.
- EXECUTORS.**
- See LIMITATIONS, STATUTE OF, 3. WITNESS, 2.
- H H 3

FACTOR.See **PRINCIPAL** and **AGENT**.**FALSE IMPRISONMENT.**See **ASSAULT** and **FALSE IMPRISONMENT**.**FALSE RETURN.**See **SHERIFF**.**FEEES.**See **PRACTICE**, 20.**FEE SIMPLE.**See **TITLE**, 1.**FORCIBLE ENTRY.**See **WITNESS**, 6.**FOREIGN CONSUL.**See **ACTION**, 1.**FOREIGN CORPORATION.**

A foreign corporation may sue in this country by their corporate name. The plaintiffs sued by the name of "The National Bank of Saint Charles"; the name given by charter of the king of Spain, was "The Bank of Saint Charles": Held no variance, the bank being in fact a national one. *The National Bank of Saint Charles v. De Bernales*,
Page 190

FOREIGN INTEREST.See **USURY**, 2.**FORFEITURE.**See **LEASE**.

1. The defendant, mortgagee of a term; purchased the mortgagor's whole

interest in the premises in consequence of the lessor's advice, "to take to the premises, and finish the buildings," given after a right of re-entry had accrued for the non-completion of the buildings: Held, that the lessor might maintain an ejectment for the forfeiture against the defendant, the buildings never having been completed, and a sufficient time having elapsed since the purchase for the completion. *Doe d. Sore v. Ekins*, Page 29

2. Ejectment on a forfeiture for breach of covenant in a lease, wherein the lessee covenanted to insure in the joint names of himself and the lessor, and in two-thirds of the value of the premises demised. The lessee had insured in his own name only, and, as contended, to a less amount than two-thirds of the value of the premises; both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that the insurance was to be in two-thirds the value of the premises. The lessor of the plaintiff had previously insured the premises at the same sum as the defendant: Held, that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude he was doing all that was necessary or required of him, by insuring in his own name and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release from the covenant. *Doe d. Knight v. Rowe*, 343

FORGERY.See **BILLS OF EXCHANGE**, 2.

FRAUD:

See **BANKER, 2. PARTNERS. SALE, 4.**

FRAUDULENT SALE.

A sale to a creditor of personal property, by a person in embarrassed circumstances, without any change of possession, is valid, unless made with a fraudulent intention to defeat other creditors. The continuance of possession is not conclusive evidence of fraud. *Eastwood v. Brown*, Page 312

FRAUDS, STATUTE OF.

See **ASSUMPSIT, 2. PERJURY, 2.**

1. A delivery order for wine lying in the *London* docks, given by the vendor to the vendee, held not to be a sufficient *acceptance* of the wine to take the case out of the statute of frauds. *Bentall v. Burn*, 107
2. Action for not accepting fifty casks of tallow stated in the declaration to have been bought of the *plaintiff*. The bought note put in evidence by the plaintiff was, "Bought this day for account of Mr. Benjamin Linthorne, of my principal, fifty casks, &c. Signed J. B. Rayner, broker." Held, that this action could not be maintained in the name of the plaintiff, there being no note in writing to take the case out of the statute of frauds; the note produced stating the tallow to be sold by the plaintiff as broker, and not as averred in the declaration, by the plaintiff himself. *Rayner v. Linthorne*, 325
3. Action on the following undertaking: "*Jarmain v. Flack*. I hereby undertake to sign a bail-bond for the above defendant, in this action,

either on a writ issued into *Sussex* or into *Middlesex*, when tendered to me, within one week from this date. *J. A.*" It was averred in the declaration that a bail-bond was *tendered* within a week from the date of this undertaking, and that defendant was requested to sign and execute it. The evidence was, that the defendant was applied to to sign a bail-bond within the week, and refused; but no bond was *tendered* for his signature, until after the week expired: Held, first, that this undertaking was not an agreement within the fourth section of the statute of frauds; secondly, that the plaintiff had failed in proving that the bond was *tendered* as averred in the declaration, and, therefore, could not recover. *Jarmain v. Algar*, Page 348

GAMING HOUSE.

Keeping a public gaming-house is not an infamous crime, so as to render a person convicted thereof incompetent as a witness. *Rex v. Grant*, 270

GUARANTEE.

A bond conditioned to indemnify and save harmless the obligees, for "such sums as they, in their banking business, should within ten years' advance or pay, or be liable to advance or pay for or on account of their accepting, discounting, &c. any bill of exchange, notes, &c. which *A. B.* should from time to time draw upon or make payable &c. at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, &c. on the credit of the said *A. B.*, or on his account; and also

all such wages and allowances for advancing, paying, &c. such bills, &c. advances, payments, engagements, and accommodations, *not exceeding the sum of 5000*l.* in the whole*, together, with interest on such advances, &c. : Held to guarantee running accounts, and not to be satisfied by the first payment of 5000*l.* : Held also, that such bond ought to be stamped with a 9*l.* stamp, under 55 G. 3. c. 184., schedule, part 1. *tit. Bond. Williams v. Rawlinson*, Page 233

GUARDIAN.

See PROCREIN AMY.

GOGGLES.

See WARRANTY, 1.

HANDWRITING.

1. A witness who had never seen the defendant, but had corresponded with a person of the defendant's name, living at *Plymouth Dock*, where the defendant resided, and where, according to other evidence, there was no other person of that name, stated that the handwriting of certain letters was that of the person with whom he had corresponded : Held, that this evidence was sufficient to admit the letters to be read against the defendant. *Harrington v. Fry*, 90
2. Handwriting of an ancient paper may be proved by the opinion of a witness, first comparing it with other authentic old writings at the time of the trial. *Doe d. Tilman v. Tarver*, 141
3. An examined copy of an answer in Chancery may be identified by a witness who has seen the hand-

writing of the defendant to the original, although the original document is not produced at the time that he speaks to his belief of the defendant's signature to it. *Dartnall v. Howard*, Page 169

HIGHWAY.

See VARIANCE, 4.

HORSE.

See WARRANTY, 2, 3:

HORSE STEALING.

See ASPORTATION.

HUSBAND AND WIFE.

See MARRIAGE.

1. *Seemle*, that although by the laws of a foreign country, husband and wife, natives of that country, and resident there, may be partners in trade, they cannot maintain a joint action against persons resident here, for a balance due to the partnership account. *Cosio v. De Bernales*, 102
2. A widow cannot be asked to disclose conversations between herself and her late husband. *Doker v. Hasler*, 198
3. In an indictment on 3 & 4 W. & M. c. 9. s. 5. against a married woman. it is sufficient, where the husband does not cohabit with her, to state that the lodging was let *to the wife*; for the statement may be either according to the fact, or the legal operation. *Rex v. Hurrell*, Page 296
4. Indictment against the wife of *W. S.* and *others*, for a conspiracy in procuring *W. S.* to marry : Held,

that *W. S.* was not a competent witness in support of the prosecution: Held, that in all cases where husband and wife are admissible witnesses *against* each other, they are also admissible *for* each other. *Rex v. Serjeant*, Page 352

ILLEGAL WAGER.

See WAGER.

IMMORAL AGREEMENT.

See LANDLORD AND TENANT, 4.

The printer of an immoral and libellous work cannot maintain an action for his bill against the publisher who employed him. *Poplett v. Stockdale*, 337

IMMORAL CONSIDERATION.

See LANDLORD AND TENANT, 4.

INCUMBENT.

See EJECTMENT, 2. EVIDENCE, 31.

INDICTMENT.

See ASPORTATION, 3. BRIDGE. HUSBAND AND WIFE, 3. PRACTICE, 2. 12. 18, 19. VARIANCE, 2, 3, 4. 6. 8.

1. An indictment for perjury committed in the Insolvent Debtor's Court, alleged that the defendant falsely, &c. swore "that his schedule presented to that court contained a full, true, and perfect account of all debts owing to him, whereas, in truth and in fact, the schedule did not contain a full, true, and perfect account of all debts owing to him," without specifying any debts omitted: Held, that this indictment was clearly bad, and that no trial

ought to be had upon it. *Rex v. Hepper*, Page 210

2. In an indictment for felony, it is not necessary to prove affirmatively for the prosecution that such a parish as that laid in the indictment exists in the county. *Rex v. Dowling*, Page 493

INDORSEMENT.

See BILLS OF EXCHANGE, 5. 11. EVIDENCE, 46.

INFAMY.

See WITNESS, 7, 8.

INFANT.

See PROCHAIN AMY.

INSOLVENT DEBTORS.

In an action against the acceptor of a bill of exchange, who pleaded his discharge under the Insolvent Debtors' Act: Held, that the description in the schedule of a bill, as drawn by the defendant and accepted by *A. B.* (who was in fact the drawer of the bill sued on,) and held by *C. D.* (an indorser on the bill,) for the precise sum, and of nearly the same date as the bill sued on, is a sufficient description for the discharge of the defendant; the mis-description of the bill not being intended, nor likely to deceive the holder. *Nias v. Nicholson*, 322

INSURANCE.

See POLICY OF INSURANCE.

INTEREST.

See **BILLS OF EXCHANGE**, 4.

1. In debt on bond in the penalty of 120*l.* conditioned for the re-payment of the same sum, with lawful interest: Held, that interest was recoverable beyond the penalty, to the amount of the damages laid in the declaration. *Francis v. Wilson*, Page 105
2. If a bill payable at a given time after date be for a specified sum, "with lawful interest for the same," interest shall be computed from the date. *Doman v. Dibden*, 381

INTERESTED WITNESS.

See **WITNESS**, 5, 6.

INTERROGATORIES.

Rules of court had been obtained for examining witnesses on interrogatories by both the plaintiff and defendant, with liberty to each to exhibit cross interrogatories; and one of the rules ordered, that the interrogatories, depositions, &c. so taken, should be admitted, read, and given in evidence at the trial of the cause, *saving all just exceptions*. *Semble*, that the plaintiff is entitled to make use of answers to interrogatories which had been exhibited on behalf of the defendant, although the plaintiff had not examined such witnesses on cross interrogatories: Held, that if the plaintiff reads the answers to interrogatories put by the defendant, he cannot object to the admissibility of some of the answers, because they referred to written documents which were not produced. *M'Intyre v. Layard*, 203

JURAT.

See **AFFIDAVIT**, 1, 2.

JURY.

See **PRACTICE**, 12, 26.

1. A jury sworn on an indictment, clearly bad in point of law, may be discharged by the judge from giving a verdict. *Rex v. Deacon*, Page 27
2. A wager was deposited with a stake-holder on the event of a dog-fight, to be paid over to the winner after the event was determined. The money was not demanded of the stake-holder until after the event was determined. The judge discharged the jury from giving any verdict. *Egerton v. Furzman*, 213
3. The withdrawing a juror by consent of the parties is no bar to a future suit on the same cause of action. *Sanderson v. Nestor*, 402

LACHES.

1. The governor and company of the bank of *England* having neglected and delayed to pass a warrant of attorney for the transfer of stock for an *unreasonable time*, are liable to answer in damages for the loss sustained in consequence of an intermediate fall of the funds. *Sutton v. Governor and Company of the Bank of England*, 52
2. Held, that the acceptors of bills of exchange, payable at a banker's in *London*, were not discharged from their liability, although the holder neglected to present them for payment at the banker's before they failed, which was several weeks after the bills became due; and although the acceptors at all times, up to the failure of the bankers,

had a balance in their hands sufficient to cover the acceptances.
Turner v. Haden, Page 215

LANDLORD AND TENANT.

1. The incumbent of a living may sustain ejectment against parties in possession of the glebe lands, though the current year of a tenancy from year to year, created by his predecessor, is unexpired. *Doe d. Kerby v. Carter*, 237
2. The institution of a party to a living, reciting the cession of his predecessor, followed by induction, is sufficient evidence to support an ejectment; though the predecessor is shewn to have been in possession; and no other evidence of his cession is given. *Ibid.*
3. A tenant verbally agreed "to pay all taxes:" Held, that under this agreement he was bound to pay the land-tax, although it was not specifically mentioned. *Amfeld v. White*, 246
4. In an action for use and occupation of a lodging under a weekly tenancy, where it did not appear that the lodging was originally let for the purposes of prostitution: Held, that the plaintiff could not recover the weekly rent, which accrued after he was fully informed, that the defendant occupied the lodgings for the purposes of prostitution. *Jennings v. Throgmorton*, 251
5. A tenant of a house from year to year, not under any agreement to repair, may quit without previous notice to his landlord, on the premises becoming unsafe and useless from want of repairs; and such tenant is not liable, in an action for use and occupation, for any rent after the occupation has ceased to be beneficial. *Edwards v. Etherington*, 268
6. Where the occupier under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement, and the landlord may distrain. *Mann v. Lovejoy*, Page 355
7. A tenant under covenant to repair, cannot maintain an action on the 14 G. 3. c. 78. (the *London* building act) against his landlord, for a moiety of the expence of rebuilding a party-wall, which, being out of repair, the tenant pulled down and rebuilt at the joint expence of himself and the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority. *Pizcy v. Rogers*, 357

LEASE.

Covenant in a lease not to let, set, assign, transfer, set over, or otherwise part with the premises thereby demised, or that present indenture of lease: Held, that a deposit with a creditor as a security for money advanced, was not a parting with, within the meaning of the covenant. *Doe d. Pitt v. Laming*, 36

LEGATEE.

See WITNESS, 2.

LIBEL.

See EVIDENCE, 22. 40. PRACTICE, 16.

1. In an action for a libel the defendant has a right to have the whole of the publication read, from which the passages charged are extracts. *Cooke v. Hughes*, 112

2. It is not libellous fairly to comment on a petition relating to matters of general interest, which has been presented to parliament, and published. *Dunne v. Anderson*, Page 287
3. The petitioner cannot maintain an action of libel for such comments unless his private character be vilified; although the publication of the petition be not shown to be his act. *Ibid.* 287
4. In libel, general evidence that the plaintiff has been in the habit of libelling the defendant is inadmissible. *Wakely v. Johnson*, 422

LIEN.

1. A livery stable keeper may, by express agreement, have a lien for the keep of horses: where the owner of horses in the possession of a livery-stable keeper who had such lien, fraudulently took them out of his possession; Held, that the livery-stable keeper might, without force, retake the horses, and that the lien would revive. *Wallace v. Woodgate*, 193
2. A banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer which may come to his hands, and may put the same in suit. And even where, taking into account the bills on both sides, the customer has a balance in his favour of a sum not equal to the amount of any one of them, this surplus cannot be appropriated to any one of the bills, in reduction of the claim of the banker suing any of the parties to the bill: *Bolland v. Bygrave*, 271

LIMITATIONS; STATUTE OF.

1. The statute of limitations is no bar to an action on a promissory note, payable "twenty-four months after demand," if presented for payment within six years before the action commenced. *Therpe v. Booth*, Page 388
2. An acknowledgement to take a case out of the statute of limitations may be inferred from the conduct of the party, without any verbal promise or admission. Therefore when A. without authority had indorsed a bill of exchange to A. and B. who received the amount from the acceptor, and the acceptor, being sued by the party to whom the bills really belonged, gave notice to A. & B. that, in the event of a verdict passing against him, he should be entitled to recover the sum previously paid on the bills from the parties to whom it was paid, and A. & B. in consequence advised particular proceedings in the defence, and continued during the whole course of the action to be consulted and advise upon it; this was held sufficient evidence to warrant the jury in finding an acknowledgment by A. of a debt due by him, so as to enable the acceptor to succeed in an action against him for money paid, or to prove under a commission of bankrupt against him, notwithstanding the statute of limitations. *East India Company v. Prince*, 407
3. In an action against several executors, pleas, general issue, and statute of limitations: Held, that neither a mere acknowledgement of the debt by all the executors, nor an express promise by one of them, takes the case out of the statute: there must be an express promise by all. *Tullock v. Dunn*, 416

LODGINGS.

See HUSBAND AND WIFE, 3. LAND-
LORD AND TENANT, 4.

LONDON BUILDING ACT.

See LANDLORD AND TENANT, 7.

LONDON TITHE ACT.

See TITHE,

MALICIOUS ARREST.

In an action for a malicious arrest,
the plaintiff cannot recover da-
mages for the extra costs. *Webber*
v. Nicholas, Page 419

MARRIAGE.

A marriage in Ireland performed by
a clergyman of the church of Eng-
land in a private house, held valid,
although no evidence was given
that any license had been granted
to the parties. *Smith v. Maxwell*,
80

MARRIAGE ACT.

The retrospective clause in 3 G. 4.
c. 75. (marriage act) is not repealed
by statute 4 G. 4. c. 76. *Rose v.*
Blakemore, 382

MEMORANDUM,

See EVIDENCE, 2, 3.

MERCANTILE INSTRUMENT.

See CONTRACT, 1, 2. PRIMA.

MINERALS.

See TITLE.

MISDEMEANOR.

See PRACTICE, 15.

**MONEY PAID, AND HAD AND
RECEIVED.**

See ASSUMPSIT, 1.

NEWSPAPER.

See EVIDENCE, 22.

NEW TRIAL.

See EVIDENCE, 1.

NOMINAL DAMAGES.

See POLICY OF INSURANCE, 1.

NOTICE OF DISHONOUR.

1. Where the drawer of a bill of ex-
change had no effects in the hands
of the acceptor from the time of
drawing the bill, till it became due,
but the acceptor had received from
the drawer, prior to this bill on
which the action was brought ac-
ceptances of the drawer, upon
which he had raised money, some
of which acceptances had been
returned dishonoured, and others
were outstanding: Held, that the
drawer was entitled to notice of
dishonour of the bill. *Spooner v.*
Gardiner, Page 84
2. A letter directed "Mr. Haynes,
Bristol," containing notice of the
dishonour of a bill, was proved to
have been put into the post-office:
Held, that this was not sufficient
proof of notice, the direction being
too general to raise a presumption
that the letter reached the parti-
cular individual intended. *Walker*
v. Haynes, 149
3. In an action against the drawer of
a bill of exchange, dated "Man-

- chester*:" Held, that it was sufficient evidence of *his* having had notice of its dishonour, to prove that a letter containing such notice, had been put into the post-office in London, directed to him, "*Manchester*." *Mann v. Moors*, Page 249
4. Where the drawer has no reasonable expectation that the bill will be paid by the drawees, he is not entitled to notice of the dishonor. *France v. Lucy*, 341

NOTICE OF SET OFF.

See PLEADING, 3.

NOTICE OF TRIAL.

See PRACTICE, 15.

NOTICE TO PRODUCE PAPERS.

See EVIDENCE, 20. SECONDARY EVIDENCE, 3. PRACTICE, 21, 22.

1. A notice to produce letters written by the plaintiff to the defendant, who was a foreigner, and had been held to bail upon coming to this country seven months previous to the trial, was served on the 10th of April, the trial taking place on the 14th: Held sufficient to let in secondary evidence of the contents, although the letters were written eighteen years back, and addressed to the defendant at his residence abroad. *Drabble v. Donner*, 47
2. In an action of trespass, notice having been given to the defendant to produce a written paper which had been delivered to *A. B.* under whom defendant justified, and under whose directions he acted: Held, that the plaintiff was not entitled to give secondary evidence of the contents. *Evans v. Sweet*, 83
3. In an action against the acceptor of a bill of exchange, where defendant's attorney had given notice to the plaintiff to produce all papers relating to a bill described, as the bill in question, and said to be "*accepted by the said defendant*:" Held, that such notice was *prima facie* evidence of the defendant's acceptance. *Holt v. Squire*, Page 282

NUISANCE.

See ANCIENT LIGHTS. EVIDENCE, 26.

OATH.

1. A witness who declines swearing on the New Testament, although he professes Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience. *Edmonds v. Rowe*, 77
2. Proof that the defendant was "sworn and examined as a witness," supports an averment, that the defendant was sworn on the Holy Gospel, that being the ordinary mode of swearing. *Rees v. Rowley*, 302

ORDER.

- A.* gives *B.* an order on his bankers, directing them "to hold over from his private account 400*l.* to the disposal of *B.*" The bankers accept the order: Held, that such order was revocable, and might be countermanded before payment made to *B.*, or appropriation to his credit. *Gibson v. Minet*, 68

OUTLAWRY.

On a writ of error to reverse an outlawry, because the defendant was

beyond seas, (if it be any answer that he went there for the purpose of avoiding the outlawry,) it is enough that he went to avoid outlawry in the action; it need not appear that he went in contemplation of the particular proceedings which did actually terminate in the outlawry. *Bryan v. Wagstaff*,
Page 329

OWNERSHIP.

See BANKRUPT, 3. EVIDENCE, 28.
SHIP, 1.

PARISH.

See INDICTMENT, 2.

PAROL EVIDENCE.

1. A fine was levied of twelve messuages in Chelsea. It was proved that the cognizor had more than twelve messuages in Chelsea: Held, that parol evidence was admissible to show which messuages the cognizor intended to pass by the fine. *Doe d. Bulkeley v. Wilford*, 88
2. An indictment for perjury in setting out the record of a conviction at the *Middlesex* sessions, stated an adjournment to have been made by Const, Esq., and A. B. C. and D. and others, their fellows, &c., justices. An examined copy of the record of conviction, when produced, stated the adjournment to have been made by Const, Esq., and E. F. G. and others, &c.: Held, that this defect might be cured by parol evidence of an adjournment made by the persons named in the indictment: Held, that no such evidence being given, the variance was fatal. *Rex v. Bellamy*, 171
3. Parol evidence is admissible to prove matters deposed by a party

on his examination before commissioners of bankrupt, material to the enquiry, such matters not being contained in the written examination taken by the commissioners. *Rowland v. Ashby*, Page 231

PARTNERS.

See BANKER, 1, 2. HUSBAND AND WIFE, 1. WITNESS, 1.

A partnership cannot acquire property in goods obtained by the fraud of one of the partners, to which the rest are not privy. *Kilby v. Wilson*, 178

PARTY WALL.

See LANDLORD AND TENANT, 7.

PATENT.

Patent for a mode of making a medicine by a particular combination of three known substances; the specification not describing those substances by their known names, but pointing out particular methods of producing them, Held bad; those methods not being essential to the combination, nor part of the invention. *Savory v. Price*, 1

PAYMENTS BY BANKRUPT.

See BANKRUPT, 6.

PEDIGREE.

See EVIDENCE, 37.

In questions of pedigree, declarations tending to show the persons making them entitled to a remainder upon failure of issue of the then possessor of an estate; held admissible

for the plaintiff claiming under that person, if made *ante litem motam*.
Doe d. Tilman v. Tarver. Page 141

PERJURY.

See EVIDENCE, 15. 38. INDICTMENT, 1.
PRACTICE, 12. 19. VARIANCE, 8.

1. A party may be indicted for perjury in an affidavit, which cannot, from certain omissions in the *jurat*, be received in the Court for which it is sworn, the perjury being held complete at the time of swearing. *Rex v. Hailey*, 94
2. In an answer in chancery to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the statute of frauds (the agreement not being in writing), and had also denied having entered into any such agreement. Upon this denial in his answer, the defendant was indicted for perjury: Held, that the denial of an agreement which by the statute of frauds was not binding on the parties, was immaterial and irrelevant, and that the defendant was entitled to his acquittal. *Rex v. Dunston*, 109

PETITION TO PARLIAMENT.

See LIBEL, 2, 3.

PLEA.

See TENDER.

PLEA PUIS DARREIN CONTINUANCE.

A plea *puis darrein continuance* may be put in at *nisi prius* upon paper. *Myers v. Taylor*, 404

PLEADING.

See INDICTMENT, 1. SALE, 1. VARIANCE.

1. Where the four first counts of a declaration were on bills of exchange, and there was a demurrer and joinder to the two first, and general issue to the rest, and *unica taxatio*, &c.: Held, that the plaintiff having proved only two bills, was not obliged to place these to the counts demurred to, but was entitled to nominal damages on those counts, and to the amount of the bills on the rest of the declaration. *Marshall v. Griffin*, Page 41
2. The declaration in trespass contained five counts, each charging several assaults. The defendant pleaded first not guilty; secondly, that the assaults in the different counts were one and the same, and then justified. Replication, *de injuria &c.* generally, and issue thereon: Held, that the plaintiff could not recover on any other assault than the one specified in the plea. *Gale v. Dalrymple*, 118
3. Notice of set-off can only be given where the general issue is pleaded, without any other plea. *Webber v. Venn*, 413

POLICY OF INSURANCE.

See ABANDONMENT. EVIDENCE, 12.

1. Where a ship received damage by striking on a rock, which rendered her unsafe for another voyage, unless repaired; and she was twice surveyed and condemned by the authorities of the place to which she was insured; and the captain, *bond fide*, sold her for fire-wood, but she might have been repaired

- but for the negligence of the resident agents of the owners : Held, that the underwriters are not liable for a total loss. The jury said, " that the ship has sustained a partial loss, but to what amount there is no evidence : " Held, that the plaintiff is entitled to a verdict, with nominal damages only. *Tanner v. Bennet*, Page 182
2. The insurer of a ship is not liable for the expences incurred by the delay of the vessel, for the purpose of recovering her cargo, when detained under process of a foreign country, if the ship itself be not detained by the process. And the circumstances causing the detainer, must be positively shown to have originated in the fraud of the master, in order to support an averment of loss by his barratry. *Bradford v. Levy*, 331
3. In an action on a policy of insurance, where a loss is to be inferred from the want of intelligence, the plaintiff must distinctly prove that when the vessel left the port of outfit, she was bound upon the voyage insured. *Quære*, Whether the non-arrival of a ship at her port of destination is evidence of her loss, where the crew have been heard of after the vessel sailed, and after she is said to have been lost. *Koster v. Innes*, 333
4. Where a ship partially damaged has been repaired by the owners, the insurers are only liable to the amount of two-thirds of the costs of repairs ; unless circumstances be shewn, to take the case out of the ordinary rule of deduction of one-third for the benefit to the owners from the repairs. *Poingdestre v. Royal Exchange*, 378
- PRACTICE.
- See COSTS. INDICTMENT, 1. INTER ROGATORIES. PLEADING, 3.
1. In indictments for misdemeanors at the instance of private prosecutors, when both defendant and prosecutor have brought down their records, and entered them with the marshal, the defendant's first, the prosecutor's lower in the list, trial must take place in the order of entry. *Rex v. Halse*, Page 20
2. A jury sworn on an indictment, clearly bad in point of law, may be discharged by the judge from giving a verdict. *Rex v. Deacon*, 27
3. When the four first counts of a declaration were on bills of exchange, and there was a demurrer and joinder to the two first, and general issue to the rest, and *unica taxatio*, &c.: Held, that the plaintiff having proved only two bills, was not obliged to place these to the counts demurred to, but was entitled to nominal damages on those counts, and to the amount of the bills on the rest of the declaration. *Marshall v. Griffin*, 41
4. A notice to produce letters written by the plaintiff to the defendant, who was a foreigner, and had been held to bail upon coming to this country seven months previous to the trial, was served on the 10th of April, the trial taking place on the 14th : Held, sufficient to let in secondary evidence of the contents, although the letters were written eighteen years back, and addressed to the defendant at his residence abroad. *Drabble v. Donner*, 47
5. In an action against bankrupts : Held, that the solicitor to the assignees, who had been served by the plaintiff with a *subpoena duces*

- tecum*, was bound to produce the books of the bankrupts, in order that entries, relating to the matters in issue might be read. *Hawkins v. Howard*, Page 64
6. A witness who declines swearing on the New Testament, although he professes Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience. *Edmonds v. Rowe*, 77
7. A prisoner, upon being arraigned, stated that he was deaf, and when the indictment was read over to him, apparently did not hear; the judge directed a jury to be empanelled to try whether he stood mute by the act of God or out of malice. *Rex v. Halton*, 78
8. When notice of intention to dispute the consideration of a bill or note has been given, and the plaintiff's witnesses have been cross-examined to that point, the plaintiff must give such evidence as he has to offer in proof of the consideration in the first instance, and will not be allowed to do so in reply. *Spooner v. Gardiner*, 86
9. In an action for a libel, the defendant has a right to have the whole of the publication read, from which the passages charged are extracts. *Cooke v. Hughes*, 112
10. On the trial of an issue from the Court of Chancery, with power to the plaintiff to examine the defendant as a witness: Held, that as matter of right, plaintiff's counsel might cross-examine the defendant, although called as his witness; the defendant standing in a situation necessarily adverse. *Clarke v. Saffery*, 126
11. A co-defendant against whom the plaintiff has given no evidence, has no right to an acquittal to be made a witness, until all the other evidence for the defendants is finished. *Wright v. Paulin*, Page 128
12. A judge at Nisi Prius may refuse to try an indictment clearly bad in point of law. An indictment for perjury, not averring the matters falsely sworn to, to be material, nor showing them to be so, is within this authority. *Rex v. Tremearne*, 147
13. On a trial for a misdemeanour in K. B. a defendant is not entitled to the assistance of counsel to cross-examine witnesses, when he reserves to himself the right of addressing the jury; but counsel may argue for him any point of law that arises, and suggest the questions to be put to the witness. *Rex v. Parkins*, 166
14. A wager was deposited with a stakeholder on the event of a dog-fight, to be paid over to the winner after the event was determined. The money was not demanded of the stakeholder, until after the event was determined. The judge discharged the jury from giving any verdict. *Egerton v. Furzman*, 213
15. On the trial of a misdemeanour, the prosecutor cannot appear for the purpose only of questioning the proof of notice of trial. When the prosecutor appears, he cannot call for proof of notice. *Rex v. Hobby*, 241
16. In an action for a libel, when the general issue is pleaded, and also special pleas in justification, the plaintiff may, in the outset, give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant, but he is not entitled to give part of such evidence in the first instance, and to reserve

- the remainder for reply to the defendant's case. *Brown v. Murray*, 254. *S. P. Sylvester v. Hall*, Page 255. n.
17. In an action of assault and battery, and a plea of justification only, and issue thereon, the defendant's counsel has a right to begin, the affirmative of the issue being on him. The onus of proving damages does not give the plaintiff's counsel a right to begin. *Bedell v. Russell*, 293
18. Two prisoners indicted for horse-stealing in county *A.*, were found in joint possession of two horses in that county, which they had jointly taken at different times and places in county *B.*: Held, that evidence could be given of one only of the takings in county *B.*, each taking being a separate felony; and that the prosecutor's counsel must elect on which to proceed. *Rex v. Smith*, 295
19. A judge at Nisi Prius has no jurisdiction to try an indictment for perjury at common law found at the quarter sessions, and removed by *certiorari* into the King's Bench; an indictment so found being void. *Rex v. Haynes*, 298
20. A sheriff's officer employed by an attorney to make arrests on *mesne* process issued at the suit of his client, may sue the attorney for the fees usually allowed for such arrests on the taxation of costs by the master, though such fees exceed the sum allowed to the sheriff and bailiff by the 23 H. 6. c. 10. *Townshend v. Carpenter*, 314
21. Notice to produce a letter relating to the matters in dispute, served on the attorney of the party, on the evening next but one before the trial, held sufficient to let in secondary evidence of the contents, though the party was out of *England*. *Bryan v. Wagstaff*, 327
22. In order to let in secondary evidence of a letter, the notice to produce must specify the letter intended; notice to produce "all letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered," is too general. *France v. Lucy*, Page 341
23. If a witness declines to answer a question, no inference of the truth of the fact inquired into may be drawn from that circumstance. *Rose v. Blakemore*, 383
24. In an indictment against several persons, the counsel for the prosecution has a right, before opening his case, to the acquittal of any defendant he intends to call as a witness. *Rex v. Rowland*, 401
25. A plea *puis darrein continuance* may be put in at *nisi prius* upon paper. *Myers v. Taylor*, 404
26. Where the plaintiff had obtained a special jury, but had neglected duly to summon them: Held, on the defendant's objecting to proceeding in the cause, that on the appearance of some of the special jurors the plaintiff was entitled to pray a *tales*, and to proceed in the trial. *Snook v. Southwood*, 429
27. When the witnesses in a cause are ordered out of Court, the attorney in the cause may remain, and be afterwards called as a witness. *Pomeroy v. Baddeley*, 430

PRIMAGE.

Where there is a written agreement between the master and owners of a ship, not mentioning *primage*, and the owners have received payments in respect of *primage* from the freighters: Held, that the master, by usage of trade, is entitled to

such payments. *Charleton v. Cotesworth*,
Page 175

PRINCIPAL AND AGENT.

See AGREEMENT. BROKER. FRAUDS, STATUTE OF, 2. TROVER, 2.

1. The defendant, a linen-draper in *Yorkshire*, had in several instances employed *A. B.* as his agent, to purchase on credit goods of the plaintiffs, linen-drapers, in *London*. *A. B.*, without the authority of the defendant, orders goods in his name to be sent by the usual conveyance, and intercepts them to his own use: Held, that the defendant is liable for such goods, he having by the previous dealings authorized the plaintiffs to treat *A. B.* as his agent. *Todd v. Robinson*, Page 217
2. The defendant, a linen-draper in *Yorkshire*, had in several instances employed *A. B.* as his agent, to purchase on credit goods of the plaintiffs, linen-drapers, in *London*. *A. B.*, without the authority of the defendant, orders goods in his name to be sent by the usual conveyance, and intercepts them to his own use: Held, that the defendant is liable for such goods, he having by the previous dealings with the plaintiffs, and with other persons, held out *A. B.* as his general agent to purchase goods. *Gilman v. Robinson*, 226

PRINTER.

See IMMORAL AGREEMENT.

PRISONER.

See EVIDENCE, 49. PRACTICE, 7.

PRIVILEGED COMMUNICATIONS.

See HUSBAND AND WIFE, 2.

1. The privilege of not being examined to such points as have been communicated to an attorney while engaged in his professional capacity, extends only to those communications which relate to a cause or suit, existing at the time of the communication, or then about to be commenced. *Williams v. Mundie*, Page 34
2. The retainer of a counsel for a cause is in the nature of a privileged communication, and cannot be disclosed. *Foot v. Hayne*, 165
3. In an action by the assignees of a bankrupt, the bankrupt may allow his attorney before the bankruptcy to give in evidence privileged communications, though offered as proof of the act of bankruptcy. *Merle v. More*, 390

PROCHEIN AMY.

The declarations of *prochein amy* made before action brought, are not admissible for the defendant. *Webb v. Smith*, 106

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PUBLISHER.

See IMMORAL AGREEMENT.

RECORD.

See COSTS 1.

Semble, that a minute-book in which entries of the proceedings at sessions

are made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence as a proof of the fact there stated. *Rex v. Bellamy*, Page 171

RELEASE.

See WITNESS, 1. 3.

REPLEVIN BOND.

In an action against the sheriff for taking insufficient sureties in replevin, if the sheriff has assigned the replevin bond to the plaintiff, it is unnecessary to prove the execution of the sureties, though averred in the declaration. *Barnes v. Lucas*, 264

REPUTED OWNERSHIP.

See BANKRUPT, 3.

RETAINER.

See EVIDENCE, 35. PRIVILEGED COMMUNICATIONS, 2.

REVERSIONARY INTEREST.

See CONSEQUENTIAL DAMAGES.

REVOCATION.

See ORDER.

SALE.

See AUCTION. FRAUDULENT SALE.

1. The plaintiff had verbally agreed with *J. E.* for the purchase of certain houses; the defendant, in writing, agreed to give the plaintiff 40*l.* for his bargain; the houses were afterwards, at plaintiff's re-

quest conveyed to the nominee of the defendant: Held, that the transfer of the parol bargain was a sufficient consideration for the promise of the defendant. *Semble*, Conveyance to the defendant's nominee, supports an averment that "the defendant became the purchaser." *Seaman v. Price*, Page 195

2. If a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has contracted to deliver, he cannot maintain an action for damages for non-performance of the contract. *Bryan v. Lewis*, 386
3. In action by vendee, for non-delivery of goods, Held, that in an agreement "for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; and if they do not so arrive, (without default in vendor) the agreement is null. *Alewyn v. Pryor*, 406
4. If a vendee, under terms to pay for goods on delivery, obtains possession of them by giving a check, which is afterwards dishonoured, he gains no property in the goods, if at the time of giving the check he had no reasonable ground to expect that it would be paid. *Hawse v. Crowe*, 414
5. In action by vendee against vendor of a lease, for the deposit: Held, that the vendor is not bound to produce his lessor's title without an express stipulation. *George v. Pritchard*, 417

SCHEDULE.

See INSOLVENT DEBTORS.

SEAL.

See APOTHECARIES, 2.

SECONDARY EVIDENCE.

See EVIDENCE, 4. 20. PRACTICE, 21, 22.

1. A notice to produce letters written by the plaintiff to the defendant, who was a foreigner, and had been held to bail upon coming to this country seven months previous to the trial, was served on the 10th of April, the trial taking place on the 14th: Held sufficient to let in secondary evidence of the contents, although the letters were written eighteen years back, and addressed to the defendant at his residence abroad. *Drabble v. Donner*, Page 47
2. In an action of trespass, notice having been given to the defendant to produce a written paper which had been delivered to A. B. under whom defendant justified, and under whose directions he acted: Held, that the plaintiff was not entitled to give secondary evidence of the contents. *Evans v. Sweet*, 83
3. Notice to a defendant to produce a check drawn by him and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the check remains in the banker's hands. *Partridge v. Coates*, 156

SET OFF.

See PLEADING, 3.

SHERIFF.

See BANKRUPT, 4. PRACTICE, 20. REPLEVIN.

Action against the sheriff for a fals

return to a writ of *f. fa.* The sheriff had returned *nulla bona*, after satisfying the landlord's claim for rent, and king's taxes: Held, that after the plaintiff had assented to the sheriff's quitting possession of the premises, upon the claim of rent and taxes appearing to exceed the value of the goods seized, he could not maintain an action for a false return, although the claim for rent was altogether unfounded. *Stuart v. Whittaker*, Page 310

SHIP.

See ABANDONMENT. EVIDENCE, 28, 29. 42. POLICY OF INSURANCE, 3. 4.

1. The registered owner of a ship is not liable for repairs, unless actually done upon his credit. Legal ownership is *prima facie* evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner's having ceased to interfere with the management of the ship. *Jennings v. Griffiths*, 42
2. The insurer of a ship is not liable for the expenses incurred by the delay of the vessel, for the purpose of recovering her cargo, when detained under process of a foreign country, if the ship itself be not detained by the process. And the circumstances causing the detainer must be positively shown to have originated in the fraud of the master, in order to support an averment of loss by his barratry. *Bradford v. Levy*, 331

SLANDER.

See EVIDENCE, 40.

SPECIAL CASE.

See EVIDENCE, 1.

STAMP.

See GUARANTEE.

1. Held, that the following memorandum, "Received of *L. and Co.* a paper parcel, directed to Messrs. *H. B. and Co.*, 62, *Lombard-Street*, value 260*l.*, which we agree to deliver to them to-morrow, fire and robbery excepted; carriage paid here," given by a carrier, on the receipt of goods, was admissible in evidence, without a stamp, as being an agreement, the subject matter of which did not exceed 20*l.*
Latham v. Rutley, Page 13
2. A memorandum by a wharfinger of the receipt of goods to be shipped in a particular manner, may be given in evidence to show the terms on which they were received, without a stamp, although the value of the goods was above 20*l.*, the wharfage being of a less amount.
Chadwick v. Sills, 15

STATUTES.

See FRAUDS, STATUTE OF. LIMITATIONS, STATUTE OF.

- Ric.* 2. st. 1. c. 7. 15. c. 2. (Forcible Entry), 242
- 23 *Hen.* 6. c. 10. (Fees on Arrests), 314
- 37 *Hen.* 8. c. 12. (London Tithes), 392
- Phil. & Mary*, 1 & 2. c. 13. 2 & 3. c. 10. (Examination of Prisoners), 232. 432.
- 21 *Jac.* 1. c. 15. (Forcible Entry), 242
- c. 19. s. 11. (Bankrupt, reputed Ownership), 73
- 15 *Car.* 2. c. 2. s. 2. (Wood Stealers), 129
- 5 *W. & M.* c. 11. 8 & 9 *W.* 3. (Indictments removed by *certiorari*), 22. n.
- 8 & 9 *W.* 3. c. 20. (Bank of England), 427
- Ann.* st. 2. c. 16. (Usury), 123. 153. 184
6. c. 22. § 9. (Bank of England), 427
- 2 *Geo.* 2. c. 23. s. 23. (Attorney's Bills), 262. 280. 284.

- 5 *Geo.* 2. c. 30. s. 41. (Bankrupt's Examination), 233. n.
15. c. 13. § 5. (Bank of England), 427
19. c. 32. s. 1. (Bankrupt, protected Payments), 265
- 6 *Geo.* 3. c. 48. (Stealing Wood), 133
14. c. 78. (London Building Act), 357
21. c. 60. s. 12. (Bank of England), 427
- 39 & 40. c. 47. s. 151. (London Docks), 161
- 48 *Geo.* 1. c. 141. § 2. (Conviction, Magistrate), 129
53. c. 155. s. 16. (East India Company), 66
55. c. 184. (Stamps), 16. 233
- c. 194. s. 21. (Apothecaries), 125. 159. 307.
- 1 & 2 *Geo.* 4. c. 52. s. 8. (Crown Lands), 339
- c. 78. (Bill of Exchange Acceptances), 362
3. c. 75. 4. c. 76. (Marriage Acts), 382
4. c. 41. (Ship Registry), 202. n.
6. c. 50 § 30. (Jury), 429
6. c. 133. s. 7. (Apothecaries), 306

STOPPAGE IN TRANSITU.

1. A wharfinger, who, on receiving an order from *A.* to "transfer, weigh, and deliver or re-house," certain tallows to *B.*, with an indorsement by *B.* to "transfer, weigh, and deliver" them to the plaintiffs, gives a written acknowledgment to the plaintiffs, that he holds the tallows on their account, cannot, upon *B.* becoming insolvent, set up as a defence for not delivering the tallows to the plaintiffs, *A.*'s right to stop in *transitu*, the plaintiffs having purchased *bonâ fide* from *B.*, although *A.* sold to *B.* at so much *per cwt.*, and the tallows have not been weighed. *Hawes v. Watson*, 6
2. Semble, that an owner of goods lying in wharf, who, upon sale of

them, gives an order on the wharfinger to "transfer, weigh, and deliver or re-house" them to his vendee, loses his right to stop *in transitu* against all who acquire a *bonâ fide* title by purchase from such vendee. *Hawes v. Watson*, Page 6

SUBPŒNA DUCES TECUM.

In an action against bankrupts: Held, that the solicitor to the assignees, who had been served by the plaintiff, with a *subpœna ducēs tecum*, was bound to produce the books of the bankrupts, in order that entries relating to the matters in issue might be read. *Hawkins v. Howard*, 64

TENANT.

See LANDLORD AND TENANT.

TENDER.

See FRAUDS, STATUTE OF, 3.

Semble, that a letter demanding payment of a debt, sent by the plaintiff's attorney, and received by the defendant, is not sufficient evidence of a demand, on the issue of a prior demand and a refusal to a plea of tender. *Semble*, that the demand should be personal, that the plaintiff may have an opportunity at the time, of paying the money demanded. *Edwards v. Yeates*, 360

TITHE.

In an action for tithes under 37 H. 8. c. 12. (*London* tithe act,) evidence that the statute and decree have been acted on in the different parishes in *London* is admissible to prove that the decree has been en-

rolled, no enrolment being found in the present records in the Court of Chancery. *Macdougall v. Young*, Page 392

TITLE.

See AUCTION.

1. In trover for copper ore raised under the plaintiff's land: Held, that the presumption that the right to the minerals accompanied the fee simple of the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil. *Rowe v. Grenfel*, 396
2. In action by vendee against vendor of a lease, for the deposit: Held, that the vendor is not bound to produce his lessor's title without an express stipulation to that effect. *George v. Pritchard*, 417

TRESPASS.

See ATTORNEY, 2. EVIDENCE, 48. PLEADING, 2.

TRIAL.

See PRACTICE, 13. 15. 18. 26.

In indictments for misdemeanours at the instance of private prosecutors, when both defendant and prosecutor have brought down their records, and entered them with the marshal, the defendant's first, the prosecutor's lower in the list, trial must take place in the order of entry. *Rex v. Halse*, 20

TROVER.

See SALE, 4.

1. Where goods lent on hire have been wrongfully taken in execution

by the sheriff: Held, that the owner cannot maintain *trover* against the sheriff, he not having the right of possession as well as the right of property at the time of the sale.

Pain v. Whittaker, Page 99

2. A factor places goods in the hands of a broker, as security for an advance to himself, and with directions to sell. The goods are sold before any revocation of these directions: the principal cannot maintain *trover* against the broker. *Stiernel v. Holden*, 219

TRUSTEE.

See BANKER, 1.

VARIANCE.

1. In an action on a bail-bond, the condition set out in the record was "to answer the said plaintiff in a plea of trespass, and also to a plea to be exhibited against the said defendant for 60*l.* upon promises." The bond, when produced, did not contain the words "*upon promises*:" variance held fatal. *Baker v. Newbegin*, 93
2. An indictment, purporting to set out the substance and effect of a bill in Chancery, stated an agreement between the prosecutor and defendant respecting *houses*. Upon the bill being read, the word *house* was in the singular number: variance held fatal. *Rex v. Spencer*, 98
3. In an indictment for perjury in an answer to a bill in Chancery, the bill was described as exhibited against three persons only, *A., B., and C.* The bill, upon being produced, was against four, *A., B., C., and D.*: Held, that this was no variance. *Rex v. Powell*, 101
4. An indictment to a nuisance to a highway, stated it to be a way for *all* the liege subjects, &c. to go, &c. with their "*horses, coaches, carts, and carriages.*" The evidence was, that carts of a particular description, and loaded in a particular manner, could not pass along this highway: Held, that this was not a mis-description, it not being laid as a highway for *all* carts, carriages, &c. *Rex v. Lyon*, Page 151
5. In debt on the statute of *Ann*, to recover penalties for usury, the declaration averred, that "the defendant afterwards, to wit, on the 3rd of *July*, 1824, did lend, &c. to *T. D.*, and *did forbear and give day of payment for the same to the said T. D. from the lending and advancing thereof*, until, &c." The money was proved to have been lent on the 5th of *July*: Held that this was a fatal variance; that the day, though laid under a *videlicet*, is material; that in an action for usury it must appear, on the face of the record, that the period of forbearance is such, that the interest taken is more than the party is by law allowed to receive. *Partridge v. Coates*, 153
6. An indictment for perjury in setting out the record of a conviction at the *Middlesex Sessions*, stated an adjournment to have been made by — *Const, Esq., and A. B. C. & D. and others, their fellows, &c. justices.* An examined copy of the record of conviction, when produced, stated the adjournment to have been made by — *Const, Esq., and E. F. G. and others, &c.*: Held, that this defect might be cured by parol evidence of an adjournment made by the persons named in the indictment: Held, that no such evidence being given,

- the variance was fatal. *Rex v. Belamy*, Page 171
7. A foreign corporation may sue in this country by their corporate name. The plaintiffs sued by the name of "The National Bank of Saint Charles." The name given by charter of the king of Spain, was "The Bank of Saint Charles." Held no variance, the bank being in fact a national one. *The National Bank of Saint Charles v. De Bernales*, 190
8. On an indictment for perjury, alleged to have been committed by the defendant as a witness in a civil action, it appeared that the evidence given on that trial by the defendant, contained all the matter charged as perjury, but other statements, not varying the sense, intervened between the matters set out: Held to be no variance, although in the indictment the evidence appeared to have been given continuously. *Rex v. Solomon*, 252
9. In an action against the sheriff on the 8 Ann, c. 14., for taking goods off the premises without paying rent, the declaration stated, that the sheriff "by virtue of, and under pretence of a certain writ of our said Lord the King, before the king himself, before that time sued forth, &c. took the goods, &c." The writ under which the goods were seized issued from the Common Pleas: Held, a fatal variance. *Sheldon v. Whittaker*, 266
10. In case against the sheriff for an escape, the declaration stated that the plaintiffs sued out an attachment of privilege, "by which said writ our Lord the King commanded the defendants, &c. to attach A. B. &c., to answer the said plaintiff of a plea of trespass on the case, to the damage of the said plaintiffs, of thirty pounds," &c. The writ produced did not contain the words "to the damage," &c.: Held, no variance. *Cousins v. Brown*, Page 291

VENDOR AND PURCHASER.

See TITLE, 2.

1. In case against the vendor of a public-house, for fraudulent misrepresentations of the business of the house, evidence of the actual value of the premises is admissible in reduction of damages, but not as a bar to the action. *Pearson v. Wheeler*, 303
2. In an action by the vendee, on an agreement for the purchase of a public-house, with mutual stipulations, and liquidated damages for non-performance: Held, both parties having made default under the agreement, that the plaintiff was entitled to recover his deposit. *Clarke v. King*, 394

VERDICT.

See POLICY OF INSURANCE, 1.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 4, 5.

USAGE OF TRADE.

See PRIMAGE.

USURY.

See VARIANCE, 5.

1. A promise to pay the principal originally lent on an usurious agreement, is invalid, unless all payments beyond legal interest are repaid or deducted. *Wicks v. Gogerley*, 123

2. Merchants in *London* agree with the defendants, *British* merchants residing at *Gibraltar*, to consign goods to them for sale upon a *del credere* commission; that the *London* correspondents of the defendants, on the consignment of the goods to the order of the defendants, shall on their account accept bills at ninety days, drawn by the consignors, for two thirds of the invoice price; that the defendants shall charge the amount of the bills in *Gibraltar* currency, with the exchange, and 6 per cent. interest from the dates; the consignors to be allowed 6 per cent. interest on balances in the hands of the defendants, that being legal interest at *Gibraltar*, and the usual mode of remitting from *Gibraltar* being by bills on *London* at ninety days: Held, that such agreement is not usurious. *Harvey v. Archbold*, Page 184

afterwards great part of them died. There was nothing to connect the disease of which they died with their previous condition; but it was in the opinion of farmers and breeders an hereditary disease, called the goggles, and incapable of discovery until its fatal appearance: Held, that this disease was an unsoundness existing at the time of the sale, the jury being of opinion, that "it existed in the constitution of the sheep at that time." *Joliff v. Bendell*, Page 136

2. A nerved horse is unsound. *Best v. Osborne*, 290

3. In assumpsit for the breach of warranty of soundness of a horse, the defendant having refused to take back the horse, the plaintiff is entitled to recover for the keep for such time only as would be required to sell the horse to the best advantage. *M'Kensie v. Hancock*, 436

WAGER.

A wager was deposited with a stakeholder on the event of a dog-fight, to be paid over to the winner after the event was determined. The money was not demanded of the stakeholder until after the event was determined. The judge discharged the jury from giving any verdict. *Egerton v. Furzman*, 213

WHARFINGER.

See EVIDENCE, 3. STOPPAGE IN TRANSIT, 1, 2.

In order to discharge a wharfinger from his responsibility for goods left with him, to be sent coastwise, a delivery to the mate or some other officer of the ship by which they are to be conveyed, is necessary. *Leigh v. Smith*, 224

WIDOW.

A widow cannot be asked to disclose conversations between herself and her late husband. *Doker v. Hasler*, 198

WARRANT OF ATTORNEY.

See LACHES, 1.

WARRANTY.

1. Certain sheep, apparently healthy and sound in every respect, were sold, warranted sound. Two months

WIFE.

See HUSBAND AND WIFE.

WINDOWS.

Where the owner of a house divided it into two tenements, and let one of them: Held, that the lessee was liable to an action on the case for obstructing windows existing in the landlord's house at the time of the demise, though of recent construction, and though no stipulation was made against the obstruction. *Riviere v. Bower*, Page 24

WITHDRAWING A JUROR.

See JURY, 3.

WITNESS.

See HUSBAND AND WIFE, 2. 4.
PRACTICE, 6. 10. 23. 27.

1. In an action against one of several partners, the defendant cannot, by a release, make his partner a competent witness for him. *Simons v. Smith*, 29
2. In an action by executors, a paid legatee is a competent witness to increase the estate. *Clarke v. Gannon*, 31
3. In an action against the sheriff for negligently executing a writ, an assistant of the sheriff's officer, who had been employed by the officer to execute the writ, is a competent witness for the sheriff, without a release from the officer. *Clark v. Lucas*, 32
4. In an action of deceit, an insolvent to whom the plaintiff has furnished goods on the representation of the defendant, is a competent

witness to prove that the defendant represented him as a person fit to be trusted. *Brant v. Robinson*, Page 48

5. A witness on the *voir dire* stated that the lessor of the plaintiff had formerly assigned to him the premises in question for a temporary purpose, that he had given up the deed to lessor of the plaintiff, and had never had any possession of the premises: Held, that the witness was incompetent by reason of interest. *Doc d. Scales v. Bragg*, 87
6. On an indictment for a forcible entry and detainer under the statutes of R. 2. and Jac. 1., the party grieved is not a competent witness. *Rex v. Beavan*, 242
7. Keeping a public gaming house is not an infamous crime, so as to render a person convicted thereof incompetent as a witness. *Rex v. Grant*, 270
8. A judgment for conspiracy to bribe a person (summoned as a witness on an information against the revenue laws) not to appear before the justices of the peace, renders the person convicted incompetent as a witness. *Bushel and others v. Barrett*, 434

WORK AND LABOUR.

See ACTION, 1.

WRIT OF ERROR.

See OUTLAWRY.



THE END.





